

# Responding to *McCleskey* and *Batson*: The North Carolina Racial Justice Act Confronts Racial Peremptory Challenges in Death Cases

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## I. INTRODUCTION

In *McCleskey v. Kemp*,<sup>1</sup> the United States Supreme Court ruled that “to prevail under the Equal Protection Clause, [the defendant] must prove the decisionmakers in *his* case acted with discriminatory purpose.”<sup>2</sup> The Court then ruled that statistical evidence regarding apparent disparities in sentencing based on race could not be used to establish the required showing in death penalty sentencing.<sup>3</sup> The decision was a serious setback to those challenging racial discrimination in the criminal justice system, and the basis of the opinion was viewed by the courts as sufficiently broad that it stopped in their tracks innovative development of statistics-based remedies.

By contrast, the Court had just a year earlier broken new procedural ground in *Batson v. Kentucky* and apparently opened the door to defendants to challenge racial discrimination in jury selection.<sup>4</sup> *Batson* authorized defendants to make a *prima facie* showing of purposeful discrimination in the prosecutor’s exercise of peremptory challenges through its pattern of strikes in the individual trial, a form of statistical evidence.<sup>5</sup> Upon the defendant establishing the *prima facie* case, the burden of production shifts to the prosecution “to come forward with a race-neutral explanation.”<sup>6</sup> These first two steps govern the production of evidence. In the third step, the trial court determines the persuasiveness of the defendant’s constitutional claim.<sup>7</sup> While the burden of production shifts to the prosecution after the defense establishes a *prima facie* case, the burden of persuasion remains throughout with

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<sup>1</sup> 481 U.S. 279 (1987).

<sup>2</sup> *Id.* at 292 (emphasis in the original).

<sup>3</sup> *Id.* at 293–97.

<sup>4</sup> 476 U.S. 79 (1986).

<sup>5</sup> *Id.* at 97.

<sup>6</sup> *Purkett v. Elem*, 514 U.S. 765, 767 (1995) (per curiam); see also *Johnson v. California*, 545 U.S. 162, 171 (2005).

<sup>7</sup> *Johnson*, 545 U.S. at 171; see also *Elem*, 514 U.S. at 768.

the defendant to show purposeful discrimination, which is resolved in the third stage.<sup>8</sup>

In ensuing years, progressive commentators have strongly criticized both *McCleskey* and *Batson*, albeit for different reasons. With regard to *McCleskey*, the criticism has been for closing the door to the potential use of statistical evidence in a broad area of criminal justice decision-making. For *Batson*, it has been, not the potential for a constitutional challenge based on a preliminary showing of discrimination, but the ineffectual nature of the challenge mechanism in practice.

In 2009, North Carolina enacted the Racial Justice Act (RJA).<sup>9</sup> It explicitly authorized the use of statistical evidence in determining whether racial discrimination was a significant factor in death sentences. In doing so, it responded to the invitation of Justice Powell, who authored *McCleskey*, that allowing statistical evidence to prove racial discrimination in criminal cases was best left to legislatures.<sup>10</sup> In addition to taking the extremely important step of embracing statistical evidence as proof of the significant the impact of race on death penalty decisions, the RJA also addressed the practical failings of *Batson*.<sup>11</sup>

North Carolina data gathered as a result of passage of the RJA and presented in on-going litigation shows that, within geographically defined prosecutorial units as well as at the state level, peremptory strikes have been made at a far higher rate against racial minorities than whites. The effects of race persist even after the study controls for a broad range of neutral justifications for those strikes.<sup>12</sup> The implications of the statute are far reaching. First, explanations that have at least some superficial plausibility when advanced in individual cases are demonstrated

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<sup>8</sup> *Johnson*, 545 U.S. at 171.

<sup>9</sup> See N.C. GEN. STAT. § 15A-2010 (2009) & § 15A-2012 (repealed 2012). See generally Seth Kotch & Robert P. Mosteller, *The Racial Justice Act and the Long Struggle with Race and the Death Penalty in North Carolina*, 88 N.C. L. Rev. 2031, 2111–31 (2010) (providing general statutory analysis and setting out provisions of the RJA).

<sup>10</sup> Justice Powell stated:

McCleskey's arguments are best presented to the legislative bodies. It is not the responsibility—or indeed even the right—of this Court to determine the appropriate punishment for particular crimes. It is the legislatures, the elected representatives of the people, that are “constituted to respond to the will and consequently the moral values of the people.” [*Furman v. Georgia*, 408 U.S. 238, 383 (1972) (Burger, C.J., dissenting)]. Legislatures also are better qualified to weigh and “evaluate the results of statistical studies in terms of their own local conditions and with a flexibility of approach that is not available to the courts,” [*Gregg v. Georgia*, 428 U.S. 153, 186 (1976)].

*McCleskey v. Kemp*, 481 U.S. 279, 319 (1987).

<sup>11</sup> The RJA provides a statutory framework to eliminate the failings of *Batson* using statistical analysis developed in a comprehensive study of the peremptory strikes exercised in relevant prosecutorial units and on a state-wide basis. Developing a comprehensive study might well present difficulties in terms of the time involved or resources required for an individual litigant, but once that study has been completed, individual defendants could supplement and update its results, extending, for example, the time period covered.

<sup>12</sup> See *infra* Part V.

to be race-based and invalid when strikes are aggregated.<sup>13</sup> Second, racial discrimination in jury selection may be proved by data, not only in individual cases, but also by state-wide and local data showing systemic practices.<sup>14</sup> In the first decision under the act, the RJA demonstrated its potential as an important new tool to eliminate the use of race-based peremptory challenges. In *State v. Robinson*, the trial court, relying heavily on statistical evidence that was buttressed by additional proof, ruled that race was a significant factor in the prosecution's use of peremptory challenges, vacated the death sentence, and sentenced the defendant to life imprisonment without the possibility of parole.<sup>15</sup> The ruling endorsed the statistical study's quality and impact, and it provided a strong indictment of the frequent use of race-based peremptory strikes by prosecutors.<sup>16</sup>

Subsequent to the *Robinson* ruling, a very different legislative majority than the one that passed the RJA rewrote the law. Having failed to eliminate the use of statistical evidence before the *Robinson* case was heard,<sup>17</sup> the legislature in the

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<sup>13</sup> One cannot be certain that the explanations were consciously pretextual because in some situations participants' racial motivation may be operating subconsciously. See Anthony Page, Batson's *Blind Spot: Unconscious Stereotyping and the Peremptory Challenge*, 85 B.U. L. REV. 155, 180–81 (2005) (arguing that "unconscious discrimination occurs, almost inevitably, because of normal cognitive processes that form stereotypes"); Jeffery Bellin & Junichi Semitsu, *Widening Batson's Net to Ensnare More Than the Unapologetically Bigoted or Painfully Unimaginative Attorney*, 96 CORNELL L. REV. 1075, 1104 (2011) (arguing that attorneys may be not only hesitant to admit racial bias when challenged under *Batson* to justify strikes but may not even be aware of the bias). See also Michael I. Norton, et al., *Mixed Motives and Racial Bias*, 12 PSYCHOL. PUB. POL'Y & L. 36, 39–40 (2006) (although not identifying whether the alternative explanation is conscious or unconscious finding that even when decisions are based on race or gender that participants tend to give justifications for the decision that mask the influence of these factors); Samuel R. Sommers & Michael I. Norton, *Race-Based Judgments, Race-Neutral Justifications: Experimental Examination of Peremptory Use and the Batson Challenge Procedure*, 31 LAW & HUM. BEHAV. 261, 269 (2007) (finding in controlled experiments that test subjects playing the role of a prosecutor trying a case with an African American defendant were more likely to challenge prospective African American jurors and when justifying these judgments they typically focused on race-neutral characteristic and rarely cited race as influential). As discussed later, see *infra* Part IV(A), IV(C) & IV(F)(4), while claims under *Batson* may require purposeful discrimination (although not an admission by the prosecutor of his or her intent), the RJA does not theoretically or practically impose such a requirement.

<sup>14</sup> See Jessica Smith, *The Racial Justice Act*, UNC SCH. OF GOV'T, 1 (Sept. 30, 2010), <http://www.sog.unc.edu/sites/www.sog.unc.edu/files/TheRacialJusticeAct.pdf>.

<sup>15</sup> Order Granting Motion for Appropriate Relief at 1, *State v. Robinson*, 91 CRS 23143 (N.C. Super. Ct. Apr. 20, 2012), 167 [hereinafter *Robinson Order*].

<sup>16</sup> Judge Weeks, in an alternative ruling, concluded that "prosecutors *intentionally used the race of venire members* as a significant factor in decisions to exercise peremptory strikes in capital cases" in the state, the judicial division and the county in which Robinson's case was tried, and "in Robinson's capital trial." *Id.* at 164–65 (Conclusions of Law para. 24) (emphasis added).

<sup>17</sup> The 2011 legislation eliminated the use of statistical evidence, but the governor vetoed the bill. See *Perdue Vetoes Repeal of Racial Justice Act*, RALEIGH NEWS & OBSERVER, Dec. 14, 2011, <http://www.newsobserver.com/2011/12/14/1710473/perdue-vetoes-repeal-of-racial.html>. In January 2012, the legislature assembled to attempt to override the veto, but one of two houses of the legislature could not assemble the votes required to overrule the veto and adjourned without taking a vote. See *Deal leaves Racial Justice Act in Limbo*, THE CHARLOTTE OBSERVER, Jan. 5, 2012,

summer of 2012 made less sweeping but quite significant changes in many provisions analyzed in this article<sup>18</sup> and successfully overrode the governor's veto.<sup>19</sup> Although the "amendment" eliminates race of the victim as a basis for challenge, it maintains the central issue of this article—the law's focus on whether "race was a significant factor in decisions to exercise peremptory challenges during jury selection"—along with the race of the defendant.<sup>20</sup> It significantly reduces in importance but does not eliminate the use of statistical evidence, declaring that "[s]tatistical evidence alone is insufficient to establish that race was a significant factor"<sup>21</sup> on which relief is premised.<sup>22</sup> The amended law considers only practices within the county or prosecutorial district,<sup>23</sup> eliminating examination of the larger geographical units of the judicial division and state and consideration of statistical evidence from those larger geographical units.

This article exclusively focuses on the RJA as initially enacted and as litigated in the *Robinson* case.<sup>24</sup> Since many of the basic concepts, such as the use of statistical evidence in analyzing the impact of race in peremptory challenges, remain part of the statutory framework, this analysis retains relevance. However, sorting out the application of the original and the revised provisions to the cases of those on North Carolina's death row and the impact of the new provisions will likely involve future statistical studies and both additional legal analysis and further litigation.

In Part II, I describe the weaknesses of *Batson* to eliminate the use of peremptory strikes in a discriminatory fashion because of the ease, when challenged, of the prosecution providing apparently neutral reasons for the strike in

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<http://www.charlotteobserver.com/2012/01/05/2899661/deal-leaves-racial-justice-act-in.html> (noting that other modifications might be considered later in the legislative session).

<sup>18</sup> See Craig Jarvis, *NC Senate Passes Rewrite of the Racial Justice Act*, RALEIGH NEWS & OBSERVER, June 20, 2012, <http://www.newsobserver.com/2012/06/20/2149771/senate-passes-rewrite-of-racial.html>.

<sup>19</sup> See Craig Jarvis, *Law Makers Override Veto of Racial Justice Act Revamp*, RALEIGH NEWS & OBSERVER, July 3, 2012, Raleigh News <http://www.newsobserver.com/2012/07/03/2174838/senate-overrides-veto-of-racial.html>.

<sup>20</sup> See N.C. GEN. STAT. § 15A-2011(d) (amended 2012).

<sup>21</sup> See *id.* at § 15A-2011(e) (amended 2012).

<sup>22</sup> See *id.* at § 15A-2011(g) (amended 2012).

<sup>23</sup> See *id.* at § 15A-2011(c) (amended 2012).

Two other changes should be noted. First, the phrase "in the defendant's case" is added to the particularity requirement, see *id.* at § 15A-2011(f) (amended 2012), which is discussed in *infra* Part IV. Second, the statute requires that race to be shown to be a significant factor "at the time the death sentence was sought or imposed," and another new provision defines "at the time" to include "the period from 10 years prior to the commission of the offense . . . [until] two years after the imposition of the death sentence." *Id.* at § 15A-2011(a) (amended 2012).

<sup>24</sup> The amendment enacted in June 2012 explicitly does not apply to the *Robinson* ruling. See S.B. 416 § 8, 136th Gen. Assemb., Reg. Sess. (N.C. 2012) (stating that the amendment does not apply to any rulings reached prior to its effective date unless the trial court's ruling is reversed on appellate review).

the context of an individual case. An occasional successful *Batson* challenge shows that doctrine retains promise where a side-by-side comparison can be made between minority jurors who were excluded and white jurors who were accepted under similar justifications and where other evidence, including a discriminatory pattern or history, can be shown. Part III describes the RJA, including its ground breaking features of an explicit elimination of *McCleskey* limitation on the use of statistical evidence to prove that race was a significant factor in decisions regarding the death penalty and its inclusion of improper use of race in the use of peremptory strikes in capital cases as a basis for relief. In Part IV, I analyze how the RJA operates to eliminate the restrictions on use of statistics by providing authority for statistical analysis through the doctrines of both disparate treatment and disparate impact familiar to civil rights litigation. As applied to the use of peremptory strikes, statistical evidence puts prosecution justifications for their strikes in a single case into a larger context and effectively provides the information only occasionally seen in *Batson* challenges through side-by-side comparisons of differently treated minority and white jurors, and it provides other evidence of discrimination, much like a history of discrimination in a jurisdiction can do. In Part V, I briefly describe data produced in the comprehensive study of North Carolina capital cases after the passage of the RJA. As noted above, its statistical analysis of practice in jury selection presents, after controlling for multiple neutral explanations, a pattern of a much higher rate of peremptory strikes used against African American jurors than whites. Part VI analyzes the first ruling under the RJA in the *Robinson* case decided in April 2012. It details the opinion's interpretation of the statute and its thorough analysis of the application of statistical and other evidence to the law that established a violation of the RJA and entitled the defendant to relief.

## II. THE WEAKNESS OF *BATSON*

The limitations of *Batson* are well documented. They are both procedural and substantive. This section focuses on the problems with *Batson*. A later section addresses the way the RJA responds to its inherent weaknesses.

### A. *Batson's Procedural Benefit and its Unrealistically Optimistic View of the Capacity of a Targeted Challenge to Eliminate Presumably Accurate Racial Stereotyping*

Under *Batson*, the defense may require a response from the prosecution on the basis of a pattern of peremptory strikes in a single case. The trial court must then decide whether the strike pattern supports an inference that the prosecutor used racial stereotyping in peremptory strikes. The ability to mount a challenge based on the prosecutor's conduct in striking jurors in the defendant's individual case

was a very significant doctrinal advance over the requirement of *Swain v. Alabama*<sup>25</sup> that the defendant must prove a pattern of discrimination.

Two problems remain, however. First, *Batson*'s framework most often provides a very limited evidentiary basis to support a remedy.<sup>26</sup> The paucity of the available proof of purposeful discriminatory intent arising from the prosecutor making a few peremptory strikes is obvious. A few peremptory strikes typically produce relatively weak evidence of discrimination, and the required explanations of the strike decisions usually provide only murky additional evidence of improper or permissible prosecutorial intent.

The second problem with *Batson*'s framework is that the decision is based on flawed and/or inconsistent premises. *Batson* makes contradictory assumptions about whether the views of African American and other minority jurors in fact correlated with their race and as a result whether striking such individuals from a jury has a predictable effect on the jury's decision. On the one hand, it assumed that the striking of jurors of the defendant's race had an impact on the likely fairness of the jury's decisions in the case and implicitly recognized that problems persisted in prosecutors' use of strikes against African Americans, suggesting that prosecutors likely assumed that African Americans generally were less supportive of the prosecution than others. On the other hand, it declared that view constitutionally impermissible as a justification for striking jurors. The Court seemed almost to assume that parties would accept that race is irrelevant to attitudes in criminal cases and overly optimistic that parties would act in a nondiscriminatory fashion instead of making the assumption that race is likely relevant to outcomes and attempt to thwart the Court's plan of equal treatment of racial groups in jury selection.

*Batson*, like *Swain*, was based on the Court's seminal decision in *Strauder v. West Virginia*.<sup>27</sup> *Batson* sought to enforce with greater fidelity *Strauder*'s command of racial justice than *Swain*'s had achieved with its onerous requirements of proof. However, *Batson* gave less emphasis to the defendant's fair trial rights and emphasized a somewhat different goal than *Strauder* in its view that the central purpose of the equal protection enterprise was the prospect of discrimination against jurors separate from its potential consequences to justice. For the *Strauder* Court, harm to the defendant was a central concern:

It is not easy to comprehend how it can be said that while every white man is entitled to a trial by a jury selected from persons of his own race

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<sup>25</sup> 380 U.S. 202, 224 (1965) (requiring the defendant to show that peremptory strikes were used systematically by the prosecution over a period of years to exclude African-Americans).

<sup>26</sup> The Court noted in *Hernandez v. New York*, 500 U.S. 352, 365 (1991), that "[i]n the typical peremptory challenge inquiry, the decisive question will be whether counsel's race-neutral explanation for a peremptory challenge should be believed. There will seldom be much evidence bearing on that issue . . . ."

<sup>27</sup> 100 U.S. 303 (1880).

or color, or, rather, selected without discrimination against his color, and a negro is not, the latter is equally protected by the law with the former. Is not protection of life and liberty against race or color prejudice, a right, a legal right, under the constitutional amendment? And how can it be maintained that compelling a colored man to submit to a trial for his life by a jury drawn from a panel from which the State has expressly excluded every man of his race, because of color alone, however well qualified in other respects, is not a denial to him of equal legal protection?<sup>28</sup>

In *Batson*, the Court restated that an African American defendant is denied equal protection when members of his race have been purposefully excluded.<sup>29</sup> However, it began doctrinal developments that put progressively more emphasis on the harm to the minority jurors in being denied a right to sit on the jury than on what it had previously recognized in *Strauder* as the obvious impact of their exclusion to deny the defendant the opportunity for a fair verdict.<sup>30</sup>

In *Batson*, the Court noted the multiple issues raised by peremptory strikes against African American jurors in the process of describing the parameters of an acceptable prosecutorial explanation of its action. It stated:

[T]he prosecutor may not rebut the defendant's *prima facie* case of discrimination by stating merely that he challenged jurors of the

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<sup>28</sup> *Id.* at 309.

<sup>29</sup> *Batson v. Kentucky*, 476 U.S. 79, 85 (1986).

<sup>30</sup> In *Batson*, the Court stated:

Racial discrimination in selection of jurors harms not only the accused whose life or liberty they are summoned to try. Competence to serve as a juror ultimately depends on an assessment of individual qualifications and ability impartially to consider evidence presented at a trial . . . . A person's race simply "is unrelated to his fitness as a juror." [*Thiel v. Southern Pacific Co.*, 328 U.S. 217, 227 (1946)] (Frankfurter, J., dissenting). As long ago as *Strauder*, therefore, the Court recognized that by denying a person participation in jury service on account of his race, the State unconstitutionally discriminated against the excluded juror. 100 U.S., at 308 . . . . The harm from discriminatory jury selection extends beyond that inflicted on the defendant and the excluded juror to touch the entire community. Selection procedures that purposefully exclude black persons from juries undermine public confidence in the fairness of our system of justice.

476 U.S. at 87.

In *Georgia v. McCullum*, 505 U.S. 42, 57 (1992), the Court concluded that criminal defendants were also barred from racial discrimination in peremptory strikes, and in the process, it arguably determined that eliminating racial stereotypes was more important than ensuring the defendant a fair trial. See generally Leonard L. Cavise, *The Batson Doctrine: The Supreme Court's Utter Failure to Meet the Challenge of Discrimination in Jury Selection*, 1999 WIS. L. REV. 501, 508-27 (1999) (tracing the progression in constitutional doctrine from one that focused on protecting the defendant from unfairness and bias through exclusion of members of his race from the jury to one that gave primacy to the right of the jurors not to be excluded under the equal protection doctrine).

defendant's race on the assumption—or his intuitive judgment—that they would be partial to the defendant because of their shared race . . . . Just as the Equal Protection Clause forbids the States to exclude black persons from the venire on the assumption that blacks as a group are unqualified to serve as jurors, . . . so it forbids the States to strike black veniremen on the assumption that they will be biased in a particular case simply because the defendant is black. The core guarantee of equal protection, ensuring citizens that their State will not discriminate on account of race, would be meaningless were we to approve the exclusion of jurors on the basis of such assumptions, which arise solely from the jurors' race.<sup>31</sup>

The unfortunate point for defendants facing the death penalty, and the inconvenient point for the efficacy of Supreme Court doctrine, is that the Court's simple statement that a widely shared assumption is baseless or constitutionally unacceptable does not make it either inconsequential or cause parties to automatically cease taking actions based on the assumption. Many have noted since the *Batson* decision that in trials, particularly high stakes criminal trials, lawyers appear to believe and to act on the assumption that jurors' racial and ethnic identities correlate with outcomes.

As Professor Charles Ogletree stated, "the Court has underestimated the interest litigants have in continuing to discriminate by race and gender if they can get away with it. Striking jurors on the basis of race or gender . . . can sometimes . . . simply be part of effective advocacy were it not entirely repugnant to the values and standards of the Constitution . . . ."<sup>32</sup> Assistant District Attorney Jack McMahon from Philadelphia in an infamous training tape for prosecutors put the same point more roughly. After discussing a racial and gendered typology of jurors for the prosecution, he gave prosecutors clear reason to discriminate: "If . . . you think you're going to be some noble civil libertarian and try to get jurors [who say they] can be fair . . . , that's ridiculous. You'll lose; you'll be out of office; you'll be doing corporate law. Because that's what will happen. You're there to win."<sup>33</sup>

Impressive empirical research has shown that prosecutors (and defense counsel) do in fact strike jurors based on race and gender. Professor David Baldus, in a study of 317 capital murder cases tried in Philadelphia between 1981 and 1997, reached three conclusions: First, discrimination on the basis of race and

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<sup>31</sup> *Batson*, 476 U.S. at 97–98.

<sup>32</sup> Charles J. Ogletree, *Just Say No!: A Proposal to Eliminate Racially Discriminatory Uses of Peremptory Challenges*, 31 AM. CRIM. L. REV. 1099, 1104 (1994).

<sup>33</sup> Videotape: Jury Selection with Jack McMahon (DATV Prods. 1987), available at <http://video.google.com/videoplay?docid=510283497297587786>. See *Commonwealth v. Basemore*, 744 A.2d 717, 729–31 (Pa. 2000); *Commonwealth v. Cook*, 952 A.2d 594 (Pa. 2008). The video tape was initially released by District Attorney Lynne Abraham during her election campaign against McMahon. See *Cook*, 952 A.2d at 611–12.



gender was widespread by both the defense and prosecution. Second, because of the smaller number of principal targets in terms of race and gender in the pool, prosecutors' use of racially biased peremptory strikes was much more effective than those by the defense. Third, the discriminatory use of peremptories had an effect on outcomes, increasing the likelihood of death verdicts for all defendants.<sup>34</sup>

#### B. Batson's Framework for Prosecutorial Justification of Peremptory Strikes

The Supreme Court's doctrinal development subsequent to *Batson*'s framework for the most part has made successful challenges by the defense difficult and relatively rare. In *Batson* itself, the principles set out appeared to prescribe an initial showing that could easily be established by the defense and importantly to place significant limitations on the types of responses deemed acceptable rebuttal by the prosecution. However, the promise of significant limitations on the prosecution's arguments was not maintained in subsequent decisions of the Court.

Once the defendant made out a *prima facie* case, the *Batson* Court recognized that justifications for peremptory strikes did not have to meet the same standard as challenges for cause. On the other hand, the Court prohibited an explanation that the prosecutor "challenged jurors of the defendant's race on the assumption—or his intuitive judgment—that they would be partial to the defendant because of their shared race . . . . Just as the Equal Protection Clause forbids the States to exclude black persons from the venire on the assumption that blacks as a group are unqualified to serve as jurors, . . . so it forbids the States to strike black veniremen on the assumption that they will be biased in a particular case simply because the defendant is black."<sup>35</sup> The Court ruled that a rebuttal "merely by denying that [the prosecutor] had a discriminatory motive or 'affirm[ing] [his] good faith in making individual selections'"<sup>36</sup> was not adequate because if accepted it would make the rebuttal requirement illusory. Finally, the Court required the prosecutor to "articulate a neutral explanation related to the particular case [being] tried."<sup>37</sup>

After this promising beginning, subsequent decisions substantially reduced *Batson*'s power to stop racial discrimination in jury selection. In *Purkett v. Elem*, the Court stated that the prosecutor's response need not be "an explanation that is persuasive, or even plausible. 'At this [stage] of the inquiry, the issue is the facial

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<sup>34</sup> David C. Baldus et al., *The Use of Peremptory Challenges in Capital Murder Trials: A Legal and Empirical Analysis*, 3 U. PA. J. CONST. L. 3, 10, 122–28 (2001). Baldus reached the conclusion based on observations of conduct that the assessment of Ogletree and McMahon was shared by prosecutors and defense counsel in Philadelphia: "It also appears that both sides believe that their discriminatory use of peremptories is based on a rational assessment of human behavior, and is essential for the protection of their client's interests given the use of such strategies by the other side." *Id.* at 124.

<sup>35</sup> *Batson*, 476 U.S. at 97.

<sup>36</sup> *Id.* at 98 (quoting *Alexander v. Louisiana*, 405 U.S. 625, 632 (1972)).

<sup>37</sup> *Id.*

validity of the prosecutor's explanation. Unless a discriminatory intent is inherent in the prosecutor's explanation, the reason offered will be deemed race neutral."<sup>38</sup> Also in *Elem*, the Court treated as an acceptable reason that the prospective juror had "long, unkempt hair, a mustache, and a beard,"<sup>39</sup> which eviscerates the restriction stated in *Batson* that the justification be related to the particular case to be tried. Even an explanation that disproportionately excludes a particular group can be accepted as race neutral.<sup>40</sup>

### C. The Ease of Prosecutorial Justifications for Peremptory Strikes

Numerous commentators have reached the conclusion that *Batson* is ineffectual. One study examining all reported cases in the first five years of *Batson*'s operation found that "in almost any situation a prosecutor can readily craft an acceptably neutral explanation to justify striking African American jurors because of their race."<sup>41</sup> The prosecutor can explain the preemptory strike on the basis of age, occupation, unemployment, demeanor, relationship with a trial participant (not amounting to reason to strike for cause), intelligence, socioeconomic status, residence, marital status, previous involvement with the criminal justice system, and jury experience, and the prosecutor should expect to have the justification accepted as race neutral.<sup>42</sup>

Another study conducted on all reported federal cases in the first decade of the twenty-first century reached the same conclusion:

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<sup>38</sup> *Purkett v. Elem*, 514 U.S. 765, 768 (1995) (per curiam) (quoting *Hernandez v. New York*, 500 U.S. 352, 360 (1991) (plurality opinion); *id.* at 374 (O'Connor, J., concurring in judgment)). North Carolina opinions have followed the path suggested in *Elem* to assume neutrality when normal analysis would reach the opposite conclusion. In *State v. Best*, 467 S.E.2d 45, 51 (N.C. 1996), the North Carolina Supreme Court drained *Batson* of its power with an extremely broad license to prosecutors. It stated: "The explanation may be implausible or even fantastic, but if it is racially neutral the opponent of the challenge has satisfied his requirement in this step in the process." *Id.* at 51.

<sup>39</sup> *Elem*, 514 U.S. at 769.

<sup>40</sup> In *Hernandez*, 500 U.S. at 360, the Court rejected a challenge to exclusion of two potential jurors who spoke Spanish in a case where the defendant was Latino. The defendant challenged exclusion because "Spanish-language ability bears a close relation to ethnicity, and that, as a consequence, it violates the Equal Protection Clause to exercise a peremptory challenge on the ground that a Latino potential juror speaks Spanish." The Court avoided the issue on the basis that "the prosecutor did not rely on language ability without more, but explained that the specific responses and the demeanor of the two individuals during *voir dire* caused him to doubt their ability to defer to the official translation of Spanish-language testimony." *Id.*

<sup>41</sup> Michael J. Raphael & Edward J. Ungvarsky, *Excuses, Excuses: Neutral Explanations under Batson v. Kentucky*, 27 U. MICH. J.L. REFORM 229, 236 (1993).

<sup>42</sup> *Id.* at 234-67 (analyzing 824 cases that applied *Batson* in its first five years of operation and finding reasons based on these grounds generally accepted).

[T]he last decade of federal court opinions reflect that prosecutors regularly respond to a defendant's *prima facie* case of racially motivated jury selection with tepid, almost laughable "race-neutral" reasons, as well as purportedly "race-neutral" reasons that strongly correlate with race. More significantly, we found that courts accept those reasons as sufficient to establish the absence of a racial motivation under *Batson*, and almost without exception, those reasons survive subsequent scrutiny in the federal courts . . . . Our study suggests that the *Batson* response is as ineffective as a lone chopstick.<sup>43</sup>

Other formal and informal analyses have reached similar results.<sup>44</sup> A huge number of reasons have been accepted by appellate courts to rebut the defense initial showing under *Batson*, and these provide a virtual laundry list of potential grounds on which prosecutors can successfully model their responses.<sup>45</sup> Armed with these reasons held acceptable in earlier appellate decisions, a moderately creative and persuasive prosecutor can generally prevail.<sup>46</sup>

#### D. Miller-El's Reminder of Batson's Promise

*Miller-El v. Dretke*<sup>47</sup> is one of the most significant decisions enforcing rights afforded by *Batson*. The case showed a glimmer of *Batson*'s promise by applying its framework with rigor. Unfortunately, however, it generated no major change in lower court approaches to *Batson* in part because so many supporting reasons were present in the case. These included impressive statistics regarding the number of African Americans the prosecution struck in that case, disparate questioning of jurors of different races, the use of a procedure of shuffling the jury, side-by-side comparisons of reasons for strikes that showed the reasons given to justify use of peremptories against African Americans applied equally to white jurors who were allowed to remain on the jury, and historical practice in the jurisdiction of a policy

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<sup>43</sup> Jeffrey Bellin & Junichi P. Semitsu, *Widening Batson's Net to Ensnare More Than the Unapologetically Bigoted or Painfully Unimaginative Attorney*, 96 CORNELL L. REV. 1075, 1092–93 (2011).

<sup>44</sup> See also Kenneth J. Melilli, *Batson in Practice: What We Have Learned about Batson and Peremptory Challenges*, 71 NOTRE DAME L. REV. 447, 448, 503 (1996) (concluding based on survey of virtually every reported case during the first eight years of *Batson*'s operation that the peremptory challenge is "the refuge for some of the silliest, and sometimes nastiest, stereotypes our society has been able to invent.").

<sup>45</sup> See Lonnie T. Brown, Jr., *Racial Discrimination in Jury Selection: Professional Misconduct, Not Legitimate Advocacy*, 22 REV. LITIG. 209, 263 & n.219 (2003) (noting that litigants keep a "host of commonly offered and accepted reasons in their arsenal to be used whenever necessary" and listing a number of them).

<sup>46</sup> The credibility of the prosecutor will often be critical. As the Court stated in *Hernandez v. New York*, 500 U.S. 352, 365 (1991), "[t]here will seldom be much evidence bearing on that issue, and the best evidence often will be the demeanor of the attorney who exercises the challenge."

<sup>47</sup> 545 U.S. 231 (2005) (*Miller-El II*).

of discrimination.<sup>48</sup> The final two bases for the decision are of particular pertinence to the RJA, which through its innovative provisions provide new tools to assess the impact of both these factors in analyzing racial discrimination in jury selection.

### 1. The Importance of Side-By-Side Comparisons of Juror Questioning

The *Miller-El* Court gave primary emphasis to side-by-side comparisons of African American panelists who were struck and white panelists who were allowed to serve.<sup>49</sup> Similarly, in the subsequent case of *Snyder v. Louisiana*,<sup>50</sup> the prosecutor's failure to adequately explain strikes against African American jurors in side-by-side comparison to similar white jurors led to reversal.<sup>51</sup> Indeed, Professors Jeffrey Bellin and Junichi Semitsu found that in their survey of federal court treatment of *Batson*, the leading reason for decisions in favor of the defense was undeniable evidence of implausible justifications when jurors of different races were compared side-by-side.<sup>52</sup> However, the authors concluded that despite "peremptory strikes that either highly correlate with race or are silly, trivial, or irrelevant to the case" courts generally affirmed the denial of relief by trial courts.<sup>53</sup> On the other hand, relief could not be avoided where the reason for the strike applied to a virtually identical juror of another race who was not stricken.<sup>54</sup> Unfortunately, the existence of such a similar juror of a different race who was treated differently is very rare because of the small number of comparables on most panels, particularly given the multiple characteristics that can be noted by the prosecutor as contributing to a decision to strike a prospective juror.<sup>55</sup>

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<sup>48</sup> *Id.* at 240–66. See Amanda S. Hitchcock, Recent Development, "Deference Does Not by Definition Preclude Relief": The Impact of *Miller-El v. Dretke* on *Batson* Review in North Carolina Capital Appeals, 84 N.C. L. REV. 1328, 1342–43 (2006) (noting that the Court relied on the collective weight of the various types of evidence of five types and that few *defendants* will have all these supporting his or her case, making the case arguably of little benefit as precedent for others).

<sup>49</sup> *Miller-El II*, 545 U.S. at 242–52.

<sup>50</sup> 552 U.S. 472 (2008).

<sup>51</sup> *Id.* at 483. Both *Miller-El* and *Snyder* were extraordinary cases for the brazenness of prosecutorial use of race, and they do not reflect a trend with few subsequent cases resulting in success for defendants raising *Batson* challenges, and lower courts largely showing indifference to the serious and persistent problem of racial discrimination in jury selection. Indeed, in *Miller-El* itself, the Supreme Court granted relief after twice being required to reverse the Fifth Circuit on what was an extremely strong record of discrimination. *Miller-El v. Cockrell*, 537 U.S. 322 (2003) [hereinafter *Miller-El I*] (reversing circuit court's denial of certificate of appealability); *Miller-El II*, 545 U.S. 231 (reversing circuit court's denial of relief).

<sup>52</sup> See Bellin & Semitsu, *supra* note 43, at 1099 (finding this basis for relief in ten of the eighteen successful post-trial *Batson* challenges).

<sup>53</sup> *Id.* at 1102.

<sup>54</sup> See *id.*

<sup>55</sup> See *id.* at 1104–06. Bellin and Semitsu note the importance of cumulating data and indicate that in a single case "[u]nfortunately, any attorney smart enough to pass a bar exam can easily

## 2. The Relevance of History and Inter-Case Comparisons

Although putting primary emphasis on side-by-side-comparisons of reasons stated by the prosecutor for striking African Americans as compared with white jurors who he accepted, the Court in *Miller-El* made the observation that it was important to go beyond data in the individual case. It noted that examinations beyond the confines of the case can be important to *Batson* rectifying the obvious failures of *Swain*. It stated:

Although the move from *Swain* to *Batson* left a defendant free to challenge the prosecution without having to cast *Swain*'s wide net, the net was not entirely consigned to history, for *Batson*'s individualized focus came with a weakness of its own owing to its very emphasis on the particular reasons a prosecutor might give. If any facially neutral reason sufficed to answer a *Batson* challenge, then *Batson* would not amount to much more than *Swain*. Some stated reasons are false, and although some false reasons are shown up within the four corners of a given case, sometimes a court may not be sure unless it looks beyond the case at hand. Hence *Batson*'s explanation that a defendant may rely on "all relevant circumstances" to raise an inference of purposeful discrimination.<sup>56</sup>

Specifically, the Court in *Miller-El* relied on a policy in the prosecutor's office to exclude African Americans from juries that had existed for decades leading up to the time of the defendant's trial.<sup>57</sup> Although in the *Miller-El* case the proof of a policy of racial exclusion was not sufficient to satisfy *Swain*, that history was part of the "relevant circumstances" that led the court to grant relief.<sup>58</sup>

The critical point made in *Miller-El* is that *Batson*'s statement that "all relevant circumstances" should be considered was not a throw-away line. This broader examination is often necessary to avoid rendering *Batson* as toothless as *Swain* if any facially neutral reason provided in the individual case was sufficient. Instead, the Court cautioned: "Some stated reasons are false, and although some false reasons are shown up within the four corners of a given case, sometimes a court may not be sure unless it looks beyond the case at hand."<sup>59</sup> As will be

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circumvent the comparative-analysis pitfall by 'packaging' additional characteristics in a way that makes it statistically impossible that another individual will have an identical response." See *id.* at 1104. See also Hitchcock, *supra* note 48, at 1350–51 (describing how the North Carolina Supreme Court rejected challenges based on side by side comparisons because the challenge was based on specific characteristics that matched between jurors but did not match all the characteristics of the compared jurors).

<sup>56</sup> *Miller-El II*, 545 U.S. at 239–40 (quoting *Batson v. Kentucky*, 476 U.S. 79, 96–97(1986)).

<sup>57</sup> *Id.* at 263.

<sup>58</sup> *Id.* at 263–64. The *Swain* challenge was denied by the trial court. *Id.* at 236.

<sup>59</sup> *Miller-El II*, 545 U.S. at 240.

developed below,<sup>60</sup> the RJA provides an important mechanism for proof outside the particular case in the form of statistical evidence showing significant impact of race in the exercise of peremptory challenges in larger prosecutorial units within which the defendant's case was tried.

### III. THE NORTH CAROLINA RACIAL JUSTICE ACT

In 2009, North Carolina enacted the Racial Justice Act. Its broad purpose was to remove the effect of race from the death penalty.

#### A. *An Explicit Legislative Determination to Eliminate the Limitations of McCleskey*

In enacting the RJA, the legislators consciously acted to undo *McCleskey's* limitation on the use of statistics. Indeed, in the debate in the state senate, Senator Doug Berger stated explicitly that this was the supporters' intention: "The *McCleskey* decision . . . said that while statistics may show race discrimination, it doesn't rise to the level of being a constitutional violation of the equal protection clause and specifically directed that if states wanted to provide this additional protection and mak[e] it a means by which someone could prove racial discrimination, then they could do it. *And that's what we're doing here today.*"<sup>61</sup> The RJA allows a defendant to use statistical evidence to establish that a sentence of death was sought or obtained on the basis of race.<sup>62</sup>

#### B. *The Structure of the RJA—Adding Discrimination in Jury Selection to the Grounds for Relief*

In examining the potential impact of race on the death penalty, the RJA considers two basic decisions. They are the decision of the prosecutor to seek the death penalty and the decision of the factfinder, usually the jury, to impose that

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<sup>60</sup> See *infra* Part IV(F)(3).

<sup>61</sup> See Transcript of Statement of Sen. Doug Berger, Senate Floor Debate on Racial Justice Act (May 14, 2009) (emphasis added) (on file with the author) (responding to an amendment offered by Sen. Phil Berger to limit the use of statistical evidence as set out in *McCleskey*). See also Transcript of Rep. Deborah Ross, House Floor Debate on Racial Justice Act (July 14, 2009) (on file with the author):

In a 5–4 decision, the US Supreme Court said that you don't have the *constitutional right* to present statistical evidence . . . [t]hough at the end of his opinion for the five judge majority, Justice Lewis Powell said "these arguments are best presented to legislative bodies. It is the Legislatures, the elected representatives of the people that are constituted to respond to the will and consequently the moral values of the people. Legislatures are also better qualified to weigh and evaluate the results of statistical studies in terms of their local conditions and with a flexibility of approach that is not available to the court." [quoting from *McCleskey v. Kemp*, 481 U.S. 279, 319 (1987)].

<sup>62</sup> See N.C. GEN. STAT. § 15A-2010 (2009).

penalty. Before enactment of the RJA, race was typically seen as entering the decision process in one of two ways: race-of-the-defendant discrimination and/or race-of-the-victim discrimination. In both the decision to seek and the decision to impose a death sentence, the question is whether those decisions were affected by race in disfavoring African American defendants over white defendants and/or favoring white victims over African Americans. The data developed in *McCleskey* showed a substantial race-of-the-victim effect, and, while a race-of-the-defendant effect existed, it was much smaller<sup>63</sup> and inevitably more debatable. This pattern has been repeated in many studies.<sup>64</sup>

Although the RJA is concerned with both race-of-the-defendant and race-of-the-victim discrimination, permitting the use of statistics to prove the impact of race<sup>65</sup> and declaring that a death sentence cannot stand if resting on race for either,<sup>66</sup> I am not concentrating on either of those issues in this article. Instead, I am focusing on the critically important issue of the prosecutor's racially discriminatory exercise of peremptory challenges as part of efforts to seek and to impose the death penalty. This issue was not raised in *McCleskey*, and, as a result, it has not been part of discussions of the impact of that case. Under the RJA, discrimination by prosecutors in selection of jurors is the third basis for statistical proof by the defendant showing that race had a substantial impact. In a statute that breaks much new ground in seeking to eliminate the effects of race from the death penalty, that is perhaps the most novel aspect of the statute.

The RJA recognizes as a separate category of proof that race was a significant factor in the exercise of peremptory challenges and that such prosecutorial action can have an impact on the decision to seek or impose the death sentence, and the statute recognizes such improper use of peremptory challenges by the prosecution as grounds for relief.<sup>67</sup> The RJA allows the use of statistical evidence in making the determination of whether race was a significant factor in exercising peremptory

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<sup>63</sup> The Supreme Court described the results as follows: "defendants charged with killing white victims were 4.3 times as likely to receive a death sentence as defendants charged with killing blacks [, and] black defendants were 1.1 times as likely to receive a death sentence as other defendants." *McCleskey*, 481 U.S. at 287.

<sup>64</sup> See, e.g., U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-GGD-90-57, DEATH PENALTY SENTENCING: RESEARCH INDICATES PATTERN OF RACIAL DISPARITIES (1990) (Report to Senate and House Committees on the Judiciary, summarizing study results); David C. Baldus & George Woodworth, *Race Discrimination and the Legitimacy of Capital Punishment: Reflections on the Interaction of Fact and Perception*, 53 DEPAUL L. REV. 1411, 1412-13 (2004) (giving overview of studies).

<sup>65</sup> See N.C. GEN. STAT. § 15A-2011(b)(1)-(2) (amended 2012) ("(1) Death sentences were sought or imposed significantly more frequently upon persons of one race than upon persons of another race; (2) Death sentences were sought or imposed significantly more frequently as punishment for capital offenses against persons of one race than as punishment of capital offenses against persons of another race.").

<sup>66</sup> See N.C. GEN. STAT. § 15A-2012(a)(3) (repealed 2012).

<sup>67</sup> See also *infra* Part IV(F)(1) (discussing further the justifications for granting relief based on race being a significant factor in the prosecutor's exercise of peremptory challenges).

challenges and had an impact on the sentencing decision. It defines four geographically-based prosecutorial units from which proof of disparate impact and discrimination is relevant: the state, the judicial division, the prosecutorial district, and the county. And it declares that, after giving the prosecution a chance to rebut, if race is shown to be a significant factor in decisions to seek or to impose the death penalty in any of these units at the relevant time,<sup>68</sup> then the death sentence is to be converted to a sentence of life without parole.

Together, the provisions of the RJA, which are set out below, remove the limitations placed on the use of statistics under the Equal Protection Clause in *McCleskey*. They also provide a broad and powerful remedy for racially discriminatory strikes in jury selection and have the potential to cure the procedural problems that have limited protection against racially discriminatory peremptory strikes under *Batson*.

As the analysis of the statute shows, the RJA puts great weight on the importance of a statistical showing that race played a significant role in the four geographic areas identified in establishing discrimination. Its allowance of statistical evidence as proof certainly shifts the burden to the prosecution. Indeed, the structure of the statute and its language indicate that not only is the burden of production shifted upon the requisite defense showing, but that effectively the burden of persuasion shifts as well. If race is shown through jury selection to have had a significant impact on decisions to impose the death penalty in a relevant prosecutorial unit and is not rebutted by the prosecution, the death sentence is to be vacated and life without parole imposed.<sup>69</sup>

In Section 15A-2011, which defines proof of racial discrimination, the RJA states:

- (a) A finding that race was the basis of the decision to seek or impose a death sentence may be established if the court finds that race was a significant factor in decisions to seek or impose the sentence of death in the county, the prosecutorial district, the judicial division, or the State at the time the death sentence was sought or imposed.
- (b) Evidence relevant to establish a finding that race was a significant factor in decisions to seek or impose the sentence of death in the county, the prosecutorial district, the judicial division, or the State at the time the death sentence was sought or imposed may include statistical evidence or other evidence, including, but not limited to, sworn testimony of attorneys, prosecutors, law enforcement officers, jurors, or other

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<sup>68</sup> The RJA specifies at a number of points that the relevant time is when the death sentence is sought or imposed. Thus, the time period at issue will differ depending on whether it is the charging decision, which occurs before trial, or exercise of peremptory strikes and jury decisions, which occur during trial. In the ensuing discussion, I will generally focus on particular geographically-based prosecutorial units without stating explicitly the requirement that race must have a significant impact in the particular prosecutorial unit at the relevant time.

<sup>69</sup> See N.C. GEN. STAT. § 15A-2012(a)(3) (repealed 2012).



members of the criminal justice system or both, that, irrespective of statutory factors, one or more of the following applies:

....

(3) Race was a significant factor in decisions to exercise peremptory challenges during jury selection.

....

(c) The defendant has the burden of proving that race was a significant factor in decisions to seek or impose the sentence of death in the county, the prosecutorial district, the judicial division, or the State at the time the death sentence was sought or imposed. The State may offer evidence in rebuttal of the claims or evidence of the defendant, including statistical evidence. The court may consider evidence of the impact upon the defendant's trial of any program the purpose of which is to eliminate race as a factor in seeking or imposing a sentence of death.<sup>70</sup>

In Section 15A-2012, which sets out procedures to be followed under the statute, the RJA further states:

(a) The defendant shall state with particularity how the evidence supports a claim that race was a significant factor in decisions to seek or impose the sentence of death in the county, the prosecutorial district, the judicial division, or the State at the time the death sentence was sought or imposed.

....

(3) If the court finds that race was a significant factor in decisions to seek or impose the sentence of death in the county, the prosecutorial district, the judicial division, or the State at the time the death sentence was sought or imposed, the court shall order that a death sentence not be sought, or that the death sentence imposed by the judgment shall be vacated and the defendant resentenced to life imprisonment without the possibility of parole.<sup>71</sup>

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<sup>70</sup> *Id.* at § 15A-2011 (amended 2012).

<sup>71</sup> *Id.* at § 15A-2012 (repealed 2012).

## IV. THE PARADIGM SHIFT

A. *The RJA's Impact on the McCleskey's Restrictions*

The RJA takes a number of important and innovative steps in its attempt to eliminate the effect of race on the death penalty. I deal initially with its direct impact on *McCleskey*. First, it makes statistical evidence admissible to show that “race was a significant factor in decisions to seek or impose the sentence of death.” This is directly stated in the statute by defining statistical evidence as relevant to establishing that race was a significant factor in decisions to seek or impose the death penalty.<sup>72</sup>

Second, it eliminates the requirement to prove intentional discrimination against the particular defendant. The RJA has no provision that requires a finding that a prosecutor or jury intentionally discriminated. It does not require that the death sentence have resulted “because of” racial discrimination. Rather, it focuses its requirement of particularity of proof, not in the individual case, but in the prosecutorial unit within which the case was tried. What it requires is a pattern of results—that race was in fact a significant factor in decisions to seek or impose the sentence—not specific proof of intent to discriminate on the basis of race in the specific case, not proof of an explicit policy of discrimination, and not a direct causal link to the result.

The RJA seeks to cure the effects of racial discrimination, and its structure permits proof using statistics that show racial discrimination resulted in *disparate treatment* either as the sole or one of the motives behind the conduct. These are well established methods of proof used in employment discrimination litigation, discussed below. Also, consistent with employment discrimination doctrine, the RJA remedies practices that are facially neutral but that have a significant *disparate impact* on African Americans.<sup>73</sup>

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<sup>72</sup> See *id.* at § 15A-2011(b) (amended 2012).

<sup>73</sup> In an employment discrimination case, *Watson v. Fort Worth Bank & Trust*, the Court stated doctrine fully consistent and appropriate to the RJA adjudication and remedial structure: [A] facially neutral practice, adopted without discriminatory intent, may have effects that are indistinguishable from intentionally discriminatory practices . . . . If an employer's undisciplined system of subjective decisionmaking has precisely the same effects as a system pervaded by impermissible intentional discrimination, it is difficult to see why Title VII's proscription against discriminatory actions should not apply. In both circumstances, the employer's practices may be said to “adversely affect [an individual's] status as an employee, because of such individual's race, color, religion, sex, or national origin.”

487 U.S. 977, 990–91 (1988) (quoting 42 U.S.C. § 2000e-2(a)(2)). Use of the analysis from employment cases such as *Watson* is entirely appropriate in interpreting the RJA given the legislature's reliance on employment discrimination doctrine. See *infra* note 75 and accompanying text. See also *infra* Part IV(C) & IV(F)(4) (discussing elimination of requirement of proving specific racial motivation).

Third, it allows statistical evidence to shift the burden of production to the prosecution by a *prima facie* showing of discrimination. Moreover, its structure and language indicates a more fundamental burden is shifted where the statistical evidence is not rebutted and the judge finds race was a significant factor in decisions to seek or impose the death penalty in a relevant prosecutorial unit. In this situation, the defendant is to be sentenced to life imprisonment without the possibility of parole under the explicit terms of the statute.<sup>74</sup>

*B. Supporting Disparate Treatment Analysis, Both as a Single Motive and Among Mixed Motives*

Employment discrimination doctrine, which was specifically cited as a model for the RJA,<sup>75</sup> provides guidance in interpreting the act. Three types of claims under Title VII provide models that should inform the analysis of the RJA, for all of them find support in the wording and structure of the statute.

I start with the “disparate treatment” cases and within that part of employment discrimination doctrine with what is called “single motive” cases. It is illustrated by *McDonnell Douglas Corp. v. Green*.<sup>76</sup> Under *McDonnell Douglas*, the plaintiff must establish a *prima facie* case, and doing so shifts the burden of production to the employer to articulate non-discriminatory reasons for the adverse employment action, which the plaintiff can show was a pretext. In this type of litigation, the plaintiff bears the burden of persuasion throughout the proceeding to establish that the adverse employment action was the result of intentional discrimination.<sup>77</sup> This is a familiar pattern of initial proof and rebuttal, which operates in *Batson* and this particular area of Title VII jurisprudence.<sup>78</sup>

The part of this doctrine that clearly does not apply to the RJA is that under this branch of employment law, the plaintiff must show that the adverse employment action was taken “because of” race.<sup>79</sup> Often this is interpreted as

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<sup>74</sup> See *supra* text accompanying note 69.

<sup>75</sup> The sponsors of the RJA explicitly acknowledged that its analysis was based on employment discrimination doctrine. See Transcript of Statement of Sen. Doug Berger, Senate Floor Debate on Racial Justice Act (May 14, 2009) (on file with author) (describing burden shifting in employment cases as a model for proof of race discrimination in judicial unit); Transcript of Statement of Rep. Rick Glazier, House Floor Debate on Racial Justice Act (July 14, 2009) (on file with the author) (describing the need for statistics to ferret out “unstated motivation” and noting their use in employment cases for this purpose as support for approach used in the RJA).

<sup>76</sup> 411 U.S. 792 (1973).

<sup>77</sup> See *Texas Dep’t Cmty. Affairs v. Burdine*, 450 U.S. 248, 252–56 (1981).

<sup>78</sup> See *Johnson v. California*, 545 U.S. 162, 171 & n.7 (2005) (describing the shifting of the burden of persuasion but not the burden of proof under *Batson* and stating that “[t]his explanation comports with our interpretation of the burden-shifting framework in cases arising under Title VII of the Civil Rights Act of 1964,” citing as an example *Furnco Constr. Corp. v. Waters*, 438 U.S. 567, 577 (1978)).

<sup>79</sup> In not imposing a requirement of causation and/or specific motivation in the defendant’s case, the RJA differs from Title VII, which states:

meaning that the improper motive must be the sole or “but for” cause of the adverse employment action.<sup>80</sup> Instead, the RJA requires only that race be shown to have been a “significant factor.”<sup>81</sup>

Another relevant type of cases within the “disparate treatment” branch of the doctrine is the “mixed motive claim.” These claims cover the situation where the employer’s action was the result of multiple factors, some legitimate and some discriminatory. While single motive cases may be proven occasionally in death penalty litigation, the more typically encountered situation involves multiple motivations, some of which may be discriminatory.

This type of claim was first recognized in *Price Waterhouse v. Hopkins*.<sup>82</sup> Under a mixed motive claim, the plaintiff is entitled to relief, absent proof of an affirmative defense by the defendant, if she shows discrimination was a “motivating factor” or “substantial factor” in the adverse employment action.<sup>83</sup> The RJA’s “significant factor” language bears strong similarity to the “motivating factor” concept, used interchangeably with “substantial factor” in *Price Waterhouse*.<sup>84</sup> As Justice Brennan stated in *Price Waterhouse*, the burden of persuasion remains with the plaintiff to show that an improper motivation played a substantial role in the employment decision, so the burden of persuasion on that particular issue does not shift.<sup>85</sup> However, once the plaintiff meets its burden, the employer must satisfy the burden of persuasion of an affirmative defense.<sup>86</sup> When

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It shall be an unlawful employment practice for an employer—(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s race, color, religion, sex, or national origin[.]

42 U.S.C. § 2000e-2(a) (2006).

<sup>80</sup> See PAUL M. SECUNDA & JEFFREY M. HIRSCH, *MASTERING EMPLOYMENT DISCRIMINATION* LAW 62 (2010).

<sup>81</sup> See, e.g., N.C. GEN. STAT. § 15A-2011(a) (amended 2012), §15A-2011(c) (amended 2012) & §15A-2012(a)(3) (repealed 2012).

<sup>82</sup> 490 U.S. 228 (1989).

<sup>83</sup> Congress subsequently wrote this mode of analysis into Title VII law, adopting the “motivating factor” language:

Except as otherwise provided in this subchapter, an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice.

42 U.S.C. § 2000e-2(m) (2006).

<sup>84</sup> See *Price Waterhouse*, 490 U.S. at 238 n.2, 249 (Brennan, J., plurality opinion), 259 (White, J., concurring), 272, 274, 276, 278 (O’Connor, J., concurring); see also *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 287 (1977).

<sup>85</sup> See *Price Waterhouse*, 490 U.S. at 246.

<sup>86</sup> *Id.* at 244–46. In the employment discrimination context, the affirmative defense for the employer is that it would have made the same decision even if gender had not played a role. *Id.* at 244–45.

the plaintiff has shown that an improper motive played a substantial role in the employment action, commentators characterize it as “a presumption of liability.”<sup>87</sup>

The RJA states that statistical evidence may be used to prove that race was a significant factor in relevant decisions.<sup>88</sup> It then recognizes that the state may rebut the defendant’s claims or evidence.<sup>89</sup> These steps may be seen as following the pattern of shifting the burden of production. Upon successful proof that race was a significant factor in decisions to seek or impose the death penalty, the defendant has met the required burden of persuasion. Thus, establishing the *prima facie* case does not technically shift the burden of persuasion, but the statute’s elimination of a requirement of “but for” proof of causation makes dispositive the issue to which statistical evidence is directed—whether race was a significant factor. The RJA authorizes the state to rebut the defendant’s proof evidence with statistical evidence. It specifically notes two potential types of responses—“statutory factors,”<sup>90</sup> such as the nature of the crime that would explain otherwise apparently questionable patterns of results,<sup>91</sup> and “any program the purpose of which is to eliminate race as a factor in seeking or imposing” a death sentence.<sup>92</sup>

The RJA focuses the defendant’s burden of proof to show that race was a significant factor in decisions to seek or impose the death penalty in one of the four relevant prosecutorial units—the county, prosecutorial district, judicial district, or state—in which the prosecution was located.<sup>93</sup> The defendant has the responsibility to make such a showing in one of these prosecutorial units “with particularity.”<sup>94</sup> However, the statute imposes no particularity requirement regarding the defendant’s individual case.

The RJA’s formulation also generally fits the pattern of proof in employment discrimination cases for systemic disparate treatment analysis by showing a pattern or practice of disparate treatment in an entity.<sup>95</sup> When systemic discrimination is found, the starting point for remedies as to individuals is that the employer has been shown to have had an improper motive. The result of finding systemic

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<sup>87</sup> See SECUNDA & HIRSCH, *supra* note 80, at 67.

<sup>88</sup> See N.C. GEN. STAT. § 15A-2011(b) (amended 2012).

<sup>89</sup> See *id.* at § 15A-2011(c) (amended 2012).

<sup>90</sup> See *id.* at § 15A-2011(b) (amended 2012).

<sup>91</sup> See *id.*

<sup>92</sup> See *id.* at § 15A-2011(c) (amended 2012). Whether either of these responses should be considered an affirmative defense is unclear, but the existence of a program might well be treated as an affirmative defense rather than negating the defendant’s *prima facie* showing.

<sup>93</sup> See *id.*

<sup>94</sup> See N.C. GEN. STAT. § 15A-2012(a) (repealed 2012). This showing of “particularity” is not required with respect to the specific case, which is a significant difference between the North Carolina Racial Justice Act and the much less effective legislation enacted in Kentucky. See Kotch & Mosteller, *supra* note 9, at 2116–18 (discussing the particularity requirement and the difference between the North Carolina and Kentucky statutes in this regard).

<sup>95</sup> See *Int’l Bhd. of Teamsters v. United States*, 431 U.S. 324, 335 (1977).

disparate treatment is a presumption that the improper motive operated as to every member of the group.<sup>96</sup>

### C. Supporting Disparate Impact Analysis

The third relevant branch of employment discrimination law is disparate impact cases. Such cases involve no showing that the employer engaged in intentional discrimination or acted even with mixed motives that included a discriminatory motive. Instead, the focus is whether the employment practice had a discriminatory effect or impact. Discriminatory impact was recognized under Title VII in *Griggs v. Duke Power Co.*<sup>97</sup> In ruling that discriminatory impact was prohibited without discriminatory motivation or intent, the Court examined the language of the statute. In *Griggs*, it held that one provision of Title VII “proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation.”<sup>98</sup>

Like Title VII, the RJA clearly intends to prohibit disparate treatment of defendants in death sentences when statistics or other evidence shows race was a significant motivating factor in the decision. The language of the RJA also supports a remedy even if race is not proved to be a motive behind a practice, but, instead, neutral practices had a significantly different effect on the treatment of jurors, defendants, or victims of a particular race. In its initial provision stating the general purpose of the statute, the RJA prohibits a death sentence based on a judgment “sought or *obtained* on the basis of race.”<sup>99</sup> Like the phrasing of the provision of Title VII that prohibited discriminatory consequences rather than the motivation behind those consequences, the word “obtained” connotes results rather than intent. The RJA generally pairs the verb “sought” or “seek” with a different and more active verb “impose” or “imposed.” This use of different and broader terminology, “obtained,” which covers any conduct that produces the result of death on the basis of race, supports disparate impact analysis.<sup>100</sup> Also, the RJA’s repeated and consistent focus on the fundamental issue of result or impact also

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<sup>96</sup> See SECUNDA & HIRSCH, *supra* note 80, at 82–83. In employment cases, the employer can avoid relief for the individual plaintiff in pattern or practice cases only if it shows the particular employee was not the victim of discrimination, such as by proving that the employee engaged in misconduct, *id.* at 83–84, or that the motive did not or could not have operated against the particular individual. The RJA is silent on the method of the state’s response after proof of pattern or practice discrimination in a relevant prosecutorial unit.

<sup>97</sup> 401 U.S. 424 (1971). In 1991, Congress added provisions explicitly providing for liability for employment practices that have a disparate impact. See 42 U.S.C. § 2000e-2(k) (2006) (setting out framework for determining when an employment practice is unlawful based on disparate impact).

<sup>98</sup> *Griggs*, 401 U.S. at 431 (referring to 42 U.S.C. § 2000e-2(a)(2) (2006)).

<sup>99</sup> N.C. GEN. STAT. § 15A-2010 (2009) (emphasis added).

<sup>100</sup> See also *Smith v. City of Jackson*, 544 U.S. 228, 235–36 (2005) (interpreting language from the Age Discrimination in Employment Act of 1967 to provide protection against disparate impact because, as in *Griggs*, the statute prohibits actions that adversely affect the employee).

supports the general interpretation that the statute prohibits significant disparate impact as well as disparate treatment.<sup>101</sup> The use of the language of “significant factor” throughout the legislation easily encompasses disparate impact analysis.

Statistical proof for disparate impact discrimination is similar to proof for disparate treatment cases. In both situations, the analysis is examining practices to determine whether members of a particular race were impacted differently. However, the goal of disparate impact analysis is not to prove motive, but is instead showing simply and directly that an apparently neutral policy or practice negatively affects a racial group significantly more heavily than another.<sup>102</sup>

#### D. Other Supporting Analysis

This article has developed the strong linkage of the RJA to civil rights law dealing with discrimination in employment. That is the most direct model to the RJA and the source of law cited by legislators during debates.<sup>103</sup> However, another body of law is supportive, which has also been used in the development of employment law.<sup>104</sup> That is, the doctrine involving challenges under the Equal Protection Clause in the directly related area of jury panel composition provides a further guidance for the operation of the RJA regarding the exercise of peremptory challenges. In *Castaneda v. Partida*,<sup>105</sup> the Court ruled under the Equal Protection Clause that the combination of a significant disparity between the percentage of Mexican-Americans in the county’s population and the percentage called for grand jury service, combined with a subjective selection system, shifted the burden of proof to the state to dispel the inference of intentional discrimination. The inference could have been dispelled by showing the result was produced by racially neutral selection criteria, but in the absence of such a showing, a constitutional violation was found.<sup>106</sup>

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<sup>101</sup> The omission from the RJA of a strict requirement that actions were taken “because of” race, see *supra* note 79 and accompanying text, strongly supports the interpretation that it embraces disparate impact treatment. See generally *Smith*, 544 U.S. at 235–36.

<sup>102</sup> See *SECUNDA & HIRSCH*, *supra* note 80, at 88.

<sup>103</sup> See *supra* note 75 and accompanying text.

<sup>104</sup> See, e.g., *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75, 78 (1998) (citing *Castaneda v. Partida*, 430 U.S. 482 (1977), (discussed below).

<sup>105</sup> 430 U.S. 482, 495–99 (1977).

<sup>106</sup> *Id.* See also *id.* at 502 (Marshall, J., concurring) (whenever both statistical disparity and discretion selection procedures have been shown, the Court has found a *prima facie* case of discriminate was established). Similarly, in *Duren v. Missouri*, the Supreme Court found under the fair cross section requirement of the Sixth Amendment that the claimant established a *prima facie* case on the basis of statistics that women were significantly underrepresented in jury venires and demonstrated it was systematic because the large discrepancy occurred weekly for over a year. 439 U.S. 357, 364–67 (1979). The state could then avoid finding a constitutional violation if it demonstrated that relevant qualifications for jury eligibility, backed by a significant state interest, produced the result. *Id.* at 367–70.

*E. The Context of the History of Systemic Exclusion of African Americans from Juries*

The RJA is extraordinary legislation. It was enacted with appreciation of a historical context of the difficult relationship between race and the death penalty in North Carolina and in the South generally.<sup>107</sup> That history shows that the United States Supreme Court's decision in *Strauder* in the later part of the nineteenth century had virtually no effect on actual African American participation in juries in North Carolina.<sup>108</sup> Superficially neutral statutes replaced explicitly discriminatory ones, but the exclusion of African Americans continued. In the middle of the twentieth century, the North Carolina Supreme Court found that no African American had ever been ruled eligible to be considered for jury service, let alone seated, on a grand jury or petit jury in one eastern North Carolina county despite the fact that the majority of its population was African American.<sup>109</sup>

Improvements in African American participation on juries occurred as the United States Supreme Court began setting benchmarks for permissible statistical variation between population percentages and those in the jury pool.<sup>110</sup> At this point, the mechanism of exclusion became the discriminatory peremptory strike,<sup>111</sup> and as *Batson* recognized, the problem of racially-motivated exclusion continued. Unfortunately, as described earlier, the *Batson* methodology continues to allow prosecutors to exercise race-based peremptory strikes by providing superficially race-neutral explanations, which courts have readily accepted. As a result, the racially motivated peremptory strike has remained the barrier to remedying the long historical pattern of African American exclusion from juries.<sup>112</sup> Furthermore, North Carolina courts have not been vigilant in enforcing *Batson*.<sup>113</sup> It was within this historical context that the RJA was enacted.<sup>114</sup>

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<sup>107</sup> Kotch & Mosteller, *supra* note 9, at 2125–27.

<sup>108</sup> *Id.* at 2073.

<sup>109</sup> *Id.* at 2039 n.27 (describing facts stated in *State v. Speller*, 47 S.E.2d 537, 538–39 (1948)).

<sup>110</sup> *Id.* at 2075–76.

<sup>111</sup> *Id.* at 2106–07.

<sup>112</sup> See *supra* Part II.

<sup>113</sup> See Hitchcock, *supra* note 48 (describing analysis on North Carolina cases).

<sup>114</sup> The broader context includes the continued widespread use of peremptory challenges to exclude African Americans from jury service throughout the South. See EQUAL JUSTICE INITIATIVE, ILLEGAL RACIAL DISCRIMINATION IN JURY SELECTION: A CONTINUING LEGACY (2010), available at <http://www.iji.org> (describing jury selection processes in eight other southern states that showed numerous instances of extremely high rates of exclusion of African Americans from juries through peremptory strikes).



*F. The Impact of the RJA on Batson and Litigation and Remedies for Race-Based Exclusion of Jurors in Death Penalty Cases*

The RJA alters *Batson* analysis and remedies in death penalty cases. It changes the focus of peremptory strike doctrine as set out in *Batson* and remedies its fundamental weakness by making four significant changes. First, as a matter of statutory definition, it links demonstrated racial discrimination in the use of peremptory challenges to decisions to seek and impose the death penalty. The RJA declares that evidence showing race was a significant factor in decisions to exercise peremptory challenges is relevant to establish that race was a significant factor in decisions to seek or impose the death penalty.<sup>115</sup> Where racially discriminatory use of peremptory strikes occurs in a relevant prosecutorial unit and as a result race is a significant factor in decisions to seek or impose the death penalty, a death sentence cannot stand.<sup>116</sup> Second, it solves the problem of finding enough similar cases to perform effective side-by-side comparisons with small groups of jurors in an individual case by allowing proof of discrimination by patterns in relevant geographically based prosecutorial units. Third, the RJA ensures that a pattern of prosecutorial strikes demonstrating significant disparities by race is given substantial weight in an analysis. Fourth, it eliminates the apparent requirement under *Batson* that a trial court must find that the prosecutor's explanation was a pretext, as opposed to simply an invalid race-based justification stated in neutral terms.

1. Eliminating Race in Peremptory Challenges to Ensure a Fair Jury for Defendants, Equal Treatment for Jurors, and Integrity of the Judicial Process for the Public

In *Miller-El v. Dretke*, the Supreme Court catalogued the types of injuries that flow from racial discrimination in jury selection:

“It is well known that prejudices often exist against particular classes in the community, which sway the judgment of jurors, and which, therefore, operate in some cases to deny to persons of those classes the full enjoyment of that protection which others enjoy.” *Strauder v. West Virginia*, 100 U.S. 303, 309 (1880) . . . . Defendants are harmed, of course, when racial discrimination in jury selection compromises the right of trial by impartial jury, *Strauder v. West Virginia*, *supra*, at 308, but racial minorities are harmed more generally, for prosecutors drawing racial lines in picking juries establish “state-sponsored group stereotypes rooted in, and reflective of, historical prejudice,” *J.E.B. v. Alabama ex rel. T. B.*, 511 U.S. 127, 128 (1994).

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<sup>115</sup> N.C. GEN. STAT. § 15A-2011(b) (amended 2012).

<sup>116</sup> *Id.* at § 15A-2012(a)(3) (repealed 2012).

Nor is the harm confined to minorities. When the government's choice of jurors is tainted with racial bias, that "overt wrong . . . casts doubt over the obligation of the parties, the jury, and indeed the court to adhere to the law throughout the trial . . ." *Powers v. Ohio*, 499 U.S. 400, 412 (1991). That is, the very integrity of the courts is jeopardized when a prosecutor's discrimination "invites cynicism respecting the jury's neutrality," *ibid.* and undermines public confidence in adjudication, *Georgia v. McCollum*, 505 U.S. 42, 49 (1992); *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 628 (1991); *Batson v. Kentucky*, [476 U.S. 79, 87 (1986)].<sup>117</sup>

The impacts discussed by *Miller-El* are wrongs to the defendant in terms of outcome by denying the defendant a fair jury and increasing the chance that it will make decisions based on prejudice. In death penalty cases, it would make the imposition of a death sentence more likely based on race. Also, when prosecutors exercise peremptory challenges in a racially discriminatory manner, they seek to have the death penalty imposed in a racially discriminatory manner. Moreover, harm occurs through the prosecutor's actions in seeking the death penalty using racially discriminatory peremptory strikes by its impact on the jurors excluded and society regardless of any specific impact on the outcome of the trial. These latter two types of injuries result whenever race is a significant factor in decisions made by the prosecutor in seeking a death penalty under the terms of the RJA.

The RJA states that evidence that "[r]ace was a significant factor in decisions to exercise peremptory challenges during jury selection" is "relevant to establish a finding that race was a significant factor in decisions to seek or impose the sentence of death."<sup>118</sup> The statute does not state specifically how racial discrimination in jury selection affects decisions either to seek or to impose the death sentence. However, numerous United States Supreme Court cases, including *Miller-El*, indicate it occurs in two ways. The first is in the impact of producing a jury with potential biases against the defendant and thereby increasing the chance of a death sentence, which the Supreme Court states as an accepted result of jury selection that denies the defendant an impartial jury. In *Batson*, the Court assumed this harm occurred when members of the defendant's own race were improperly excluded.<sup>119</sup> The second occurs through the direct conduct of the prosecutor harming jurors and society in using the race-based preemptory challenges in seeking the death penalty. Under the RJA's terms, the required showing that race was a significant factor in decisions to seek and impose a death sentence is

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<sup>117</sup> *Miller-El v. Dretke*, 545 U.S. 231, 237–38 (2005).

<sup>118</sup> N.C. GEN. STAT. § 15A-2012 (a) & § 15A-2012 (a)(3) (repealed 2012).

<sup>119</sup> See *Batson v. Kentucky*, 476 U.S. 79, 96 (1986). See also *Strauder v. State of West Virginia*, 100 U.S. 303, 308–10 (1879) (discussing right of citizens to be tried by jury from which his peers have not been excluded as part of the protection against prejudice).

established if preemptory challenges were used in a racially discriminatory manner. This second type of harm to jurors and the society occurs regardless of the race of the defendant.<sup>120</sup>

The RJA is not clear on the breadth of the remedy when racially discriminatory strikes are shown in one of the four designated prosecutorial units—county, prosecutorial district, judicial district, or state. Under a broad reading to the statute’s purpose, because racially motivated strikes are such a fundamental violation of the basic principle of equal justice, such discrimination is inconsistent with the imposition of any death sentence in the prosecutorial unit where that discriminatory action occurred. Under this broad reading, if the evidence establishes that race substantially animated prosecutorial preemptory strikes in a prosecutorial unit, death sentences cannot be carried out within the unit. A narrower interpretation is even more strongly supported. Where the record shows that the prosecutor in the defendant’s individual case used preemptory challenges disproportionately against racial minorities, the defendant has demonstrated that the harms identified as resulting from discriminatory use of preemptory challenges operated in his case. Moreover, the statistical data demonstrated that they were not only racially discriminatory but also were used systemically within the prosecutorial unit.<sup>121</sup> In that situation, the statute would require relief to the defendant making this showing.

## 2. In Essence Providing a Broader Basis for Side-By-Side Comparisons

The RJA is generally groundbreaking, and it is particularly groundbreaking in its treatment of racially motivated preemptory challenges. One of the most significant of those changes is not substantive but technical and procedural. The proof structure under the RJA permits the defense to demonstrate through statistical evidence the invalidity of superficially racially neutral explanations, which are easily articulated and difficult to unmask in individual cases, by allowing examination of the racial pattern of strikes and the explanations across multiple cases. When broadly considered, explanations that are covers for conscious or unconscious discrimination often will lack neutral justification.

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<sup>120</sup> Cf. *Powers v. Ohio*, 499 U.S. 400, 402 (1991) (ruling that defendant did not have to be African American to raise a *Batson* challenge to removal of African Americans from the jury because the protection of the defendant from discrimination was only one of the purposes served and harm to excluded jurors from discrimination exists regardless of the defendant’s race).

<sup>121</sup> The case of Marcus Robinson, an African American, presents such a factual basis. In his case, the prosecution struck 50% of prospective African American jurors and only 15% of those of other races. See Motion for Appropriate Relief Pursuant to the Racial Justice Act at 2, *State v. Marcus Robinson*, No. 91 CRS 23143 (N.C. Super. Ct. Aug. 5, 2010). Statistical data in each of the prosecutorial units demonstrates this strong pattern of racially motivated preemptory strikes at the state, judicial district, prosecutorial district, and county. See BARBARA O’BRIEN & CATHERINE M. GROSSO, REPORT ON JURY SELECTION STUDY (revised Dec. 15, 2011), tbl.6 (showing state-wide strike rates 1990–94) & tbl.10 (showing strike rates in former Division 2 and in Cumberland County, which is its prosecutorial district).

The frame of reference permitted by the RJA of counties, prosecutorial districts, judicial districts, and the state allows explanations to be tested cumulatively. The testing often involves cases handled by different prosecutors and sometimes prosecutors in different prosecutorial units, but these prosecutors are all working on a specialized and highly controlled form of litigation—death penalty cases. Moreover, they share the same body of caselaw, and, being part of a common society at a particular point in historical time, they inevitably share its stereotypes and biases. The group of prosecutors examined under the RJA may not be following an explicit, shared script across offices, but they share a common enterprise.<sup>122</sup>

Of course, the RJA's authorization to use statistical evidence does not actually create explicit side-by-side comparisons outside of the individual case, but a sophisticated statistical analysis of preemptory strikes essentially permits comparisons of similarly situated cases. As to actual side-by-side comparisons, it is with non-statistical evidence that the RJA most directly authorizes such comparisons. The RJA allows evidence to be considered outside the individual case in those handled by the same prosecutor or by prosecutors in the same office or offices in the same county, judicial district, or the state.

The statistical study conducted after passage of the RJA supports the position that facially neutral explanations given in individual cases were in fact pretextual or at least substantively invalid. The statistical evidence shows both significant disparate racial impact and disparate treatment motivated directly or at least in part by race, all apparently prohibited by the RJA.<sup>123</sup> The trial court's opinion also documents that when side-by-side comparisons are extended beyond the confines of a particular case to explanations within the county, African Americans and white venire members who have the same characteristics are treated differently.<sup>124</sup> Both through statistical analysis and by broader case comparisons, the RJA expands the types of relevant evidence that the trial court can consider and thereby helps remedy the clear failing of *Batson*'s narrow, case-specific focus.

### 3. Giving Significant Evidentiary Value to Statistical Evidence that Shows a Pattern and History of Racial Discrimination

As discussed in the preceding section, the availability of statistical evidence and data from broader prosecutorial units of which the defendant's jurisdiction was a part effectively allows empirical testing of the validity of the prosecutors'

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<sup>122</sup> Cf. *Miller-El v. Cockrell*, 537 U.S. 322, 347 (2003) (considering past policy of discrimination relevant to the determination of whether discrimination occurred because even if it is presumed that the prosecutors who handled Miller-El's case "were not part of this culture of discrimination, . . . they were likely not ignorant of it").

<sup>123</sup> See N.C. GEN. STAT. § 15A-2010 (2009).

<sup>124</sup> See Robinson Order, *supra* note 15, at 143–49 (describing inconsistent treatment of white and African American venire members in Cumberland County).

justifications for the peremptory strikes. That is the second and one of the important missing pieces from most strictly *Batson*-based determinations, but which was critical in *Miller-El*. It is what *Miller-El* described as the critical ability to refute false reasons given for strikes by use of evidence from “beyond the case at hand.”<sup>125</sup>

The RJA admits statistical evidence from the larger prosecutorial units that encompass the jurisdiction in which the defendant’s case was tried. It seeks to determine whether there are patterns of discrimination in jury selection operating in those units, and, if so, it authorizes their use as evidence. The burden shifting procedure is discussed elsewhere. What the RJA does is to ensure that a pattern of prosecutorial strikes demonstrating significant disparities by race will be given weight in the analysis determination of whether race was a significant factor in the exercise of peremptory strikes and whether considerations of race had a significant effect on decisions to seek and impose the death sentence.

The unadjusted statistics show apparent race based patterns of practice, which the RJA directs are to be adjusted for truly race neutral reasons and justifications based on elements of the death penalty statutory structure. After the state has presented any rebuttal evidence authorized by the RJA, the court can assess and determine whether race was a significant factor in the process and was part of seeking or imposing the death sentence.

#### 4. Requirement of Significant Racial Impact, Not Proof of Specific Racial Motivation

*McCleskey* limited defense claims generally by requiring specific proof of racial intent in the defendant’s case. *Batson* also requires purposeful discrimination against the particular defendant, albeit not requiring an admission of such discriminatory intent by the prosecutor.<sup>126</sup> The RJA clarifies and simplifies the required showing.

Specific racial intent is not required. Instead, a violation is found based on proof that “race was a significant factor in decisions to seek or impose the sentence of death.”<sup>127</sup> The RJA, like the civil rights legislation which provided its inspiration, finds a violation whether the discrimination was intentional and/or recognized by the prosecutor or whether it was unconscious and not explicitly intended, and even based on disparate impact alone.<sup>128</sup>

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<sup>125</sup> See *Miller-El v. Dretke*, 545 U.S. 231, 240 (2005); *supra* Part II(D)(2).

<sup>126</sup> See *Bellin & Semitsu*, *supra* note 43, at 1099 (describing the results of a study in which no *Batson* violation was found based on the facial implausibility of the prosecutor’s justification for a strike, but a number were found based on the “undeniable evidence of implausibility” based on side-by-side comparisons).

<sup>127</sup> N.C. GEN. STAT. § 15A-2012 (a)(3) (repealed 2012).

<sup>128</sup> See *supra* text accompanying note 73 and accompanying text and Part IV(F). In his order granting relief to Marcus Robinson, Judge Weeks noted the role of unconscious bias in jury selection,

## V. THE NORTH CAROLINA RACIAL PEREMPTORY STRIKE DATA

As a consequence of the RJA, a study of peremptory strikes in North Carolina death cases was conducted by Professors Barbara O'Brien and Catherine Gross of Michigan State University College of Law.<sup>129</sup> The study examined jury selection data for at least one proceeding for each of the defendants on North Carolina's death row on July 1, 2010.<sup>130</sup> This totaled 173 proceedings with a total of 7,421 strike-eligible venire members, who remained after voir dire questioning and exclusion for cause.<sup>131</sup> Of these, 81.6% were white, 16.3% were African American, and 2.0% were of other races.<sup>132</sup>

### A. Significant Gross Disparities

On a state-wide basis, prosecutors exercised peremptory strikes against African Americans at a much higher rate than whites. Cumulatively, prosecutors struck 52.6% of eligible African American venire members, but only 25.7% of all others. This difference in strike rates is significant at the .001 level.<sup>133</sup> As a matter of average strike rate per case, the rate was similar. Of the 166 cases that had at least one eligible African American venire member, the average strike rate for African American venire members was 55.6% and only 24.8% for all other venire members. This difference is also significant at the .001 level.<sup>134</sup>

It is particularly telling that the disparities were even greater when the defendant in the case was African American. In such cases, the average strike rate went up to 60.0% against African American venire members and down to 23.1% against other venire members. In cases where the defendant was not African American, the average strike rate went in the opposite direction—to 51.4% for African American venire members and 26.8% for other venire members. This disparity is significant at the .03 level.<sup>135</sup>

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relying on the testimony of three of Robinson's expert witnesses and testimony by a former prosecutor who tried the defendant's capital trial. *See infra* text accompanying notes, 190–91.

<sup>129</sup> *See* O'BRIEN & GROSSO, *supra* note 121.

<sup>130</sup> On this date, 159 inmates were on North Carolina's death row. *See* Kotch & Mosteller, *supra* note 9, at 2041.

<sup>131</sup> *See* O'BRIEN & GROSSO, *supra* note 121, at 2–3.

<sup>132</sup> *Id.* at 3, 11. Race was identified for all but a total of 7 (.1%) venire members. *Id.*

<sup>133</sup> *Id.* at 11–12.

<sup>134</sup> *Id.* at 12.

<sup>135</sup> *Id.* The study found that disparities persisted if the state-wide data was divided into different periods of time and when the data was examined by judicial division. *Id.*

*B. Demonstrating the Ineffectiveness of Non-Racial Explanations for Peremptory Strike Data*

The study found that the disparities in strike rates against eligible African American venire members persisted when other race-neutral characteristics and other characteristics that one might expect to be part of the decision to strike jurors other than race were included in the analysis. Among the most significant factors revealed by the analysis were: (1) expression of reservations about the death penalty; (2) lack of employment; (3) criminal history of venire member or close relative; (4) knowledge of trial participants.<sup>136</sup> When these other factors are included in the analysis, either individually or together, they did not eliminate the significance of the racial disparities.<sup>137</sup>

All told, the researchers found approximately 25 variables that bore a significant relationship to the strike decision. They included the marital status of the venire member; perception that serving on the jury would impose a hardship; status as a homemaker; venire member or someone close to the venire member works in law enforcement; expression of view suggesting view favorable to the state; and venire member went to graduate school.<sup>138</sup> After these factors were incorporated into the analysis, the fact that the prospective juror was African American remained significant at the .001 level and the likelihood of being struck by the state was 2.48 times the likelihood of all other venire members.<sup>139</sup>

This statistical analysis provides an effective rejoinder to claims that peremptory strikes were used neutrally with regard to race by prosecutors at the state-wide level.<sup>140</sup> Regardless of whether the apparently race neutral explanation was explicitly a pretext or a sincere but invalid use of a racial stereotype, the analysis of the cumulated data provides strong evidence that the race neutral explanations were not in fact race neutral.

This analysis also provides evidence that race was a significant factor in decisions to exercise peremptory strikes under the statute.<sup>141</sup> The results are statistically significant at the .001 level. In addition, the magnitude of the impact is substantial. Even after controlling for other factors, being African American makes it 2.48 times more likely that the potential juror will be struck. The impact

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<sup>136</sup> *Id.* at 13 and tbl.11.

<sup>137</sup> *Id.* at 13.

<sup>138</sup> *Id.* at tbl.12. This second part of the study was based on a random sample of the 7,421 venire members in the first part of the study, amounting to approximately 25% of that group or 1,753. In this part, additional coding was done for descriptive information that might bear on a prosecutor's decision to strike the venire member. *See id.* at 13–14. *See also* Robinson Order, *supra* note 15, at 50–51 (describing methodology).

<sup>139</sup> O'BRIEN & GROSSO, *supra* note 121, at 15 & Table 12.

<sup>140</sup> A sophisticated analysis of the validity of purportedly race neutral reasons requires a substantial data set, and such analysis is likely best provided in a state-wide analysis of strikes.

<sup>141</sup> *See* N.C. GEN. STAT. § 15A–2011(b)(3) (amended 2012).

of race is neither theoretical nor minor, but real and substantial. Many issues must be resolved to decide individual cases, including the soundness of the study's methodology, the significance of its results under the statutory structure, the effectiveness of the state's rebuttal, and the specific application to individual cases. The overall study, however, strongly suggests that the concerns regarding the effect of race on peremptory strikes, reflected by their inclusion in the RJA, were well-founded.

#### VI. THE FIRST RULING UNDER THE RJA—RACE A SIGNIFICANT FACTOR IN PEREMPTORY CHALLENGES

On April 20, 2012, the first ruling came on the RJA's application to peremptory strikes. In *State v. Marcus Robinson*, Superior Court Judge Gregory A. Weeks ruled that "race was, in fact, a significant factor in the prosecution's use of peremptory strikes,"<sup>142</sup> which the statute prohibits. Accordingly, he vacated the death sentence and, as mandated by the statute, sentenced Robinson to life imprisonment without the possibility of parole.<sup>143</sup>

The ruling, which runs 167 pages, construes the major components of RJA and applies it to the evidence, both statistical and otherwise, presented by the defendant and the state. The ruling is broad and thorough. It is particularly thorough in examining the statistical study presented by the defendant, which Judge Weeks found to be sound and compelling in establishing a violation of the statute. The opinion bases relief on multiple grounds, principally that "[r]ace was a significant factor in prosecutorial decisions to exercise peremptory strikes"<sup>144</sup> prohibited by the RJA. However, the most powerful of these grounds is the court's alternative determination that "prosecutors intentionally used the race of venire members as a significant factor in decisions to exercise peremptory strikes in capital cases" in the state, the judicial division and the county in which Robinson's case was tried, and "in Robinson's capital trial."<sup>145</sup>

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<sup>142</sup> See Robinson Order, *supra* note 15, at 1.

<sup>143</sup> See N.C. GEN. STAT. § 15A-2012(a)(3) (repealed 2012). The court ruled that imposing a sentence of life without the possibility of parole did not violate the *ex post facto* clause because it reduced the sentence of death to life rather than increasing the sentence. See Robinson Order, *supra* note 15, at 43. Curiously, the opponents of the RJA have argued that the provision is unconstitutional to support their political position that it should be repealed because it will allow convicted murderers sentenced before life without the possibility of parole was approved as a sentence to be paroled. See Craig Jarvis, *Fears about Racial Justice Act Debated*, RALEIGH NEWS & OBSERVER, Dec. 24, 2011, available at <http://www.newsobserver.com/2011/12/24/1731313/racial-act-fears-debated.html>.

<sup>144</sup> Robinson Order, *supra* note 15, at 164-65 (Conclusions of Law paras.19-23) (concluding race was a significant factor in such decisions at the time of Robinson's trial in the state, the judicial district and the county, and in Robinson's trial itself).

<sup>145</sup> *Id.* (Conclusions of Law para. 24).



### A. Construction of the Statute

Judge Week's opinion is, in my judgment, a sound exposition of the provisions of the law. He relies on many of the same arguments and authorities set out in earlier sections of the paper.<sup>146</sup> I recount here the major elements of the court's ruling, which may soon be reviewed the North Carolina Supreme Court.<sup>147</sup>

#### 1. Requirements for Relief

In tracing the origins of the RJA, Judge Weeks concluded that the legislature accepted the invitation of *McCleskey* "to respond to the will and consequently the moral values of the people" when addressing the difficult and complex issue of racial prejudice in the administration of capital punishment."<sup>148</sup> This resulted in an RJA structure that accepts proof by statistical evidence without the narrow constraints imposed when remedies are based exclusively on federal constitutional requirement under the Equal Protection Clause.

The case dealt only with the issue of the prosecutor's use of peremptory challenges, and the court concluded that showing race was a "significant factor" in decisions to exercise peremptory strikes alone "is sufficient to establish an RJA violation."<sup>149</sup> The court ruled that the defendant was not required to prove intentional discrimination or that race was the basis of decision to seek or impose a death sentence in the defendant's particular case.<sup>150</sup> Neither is required by the plain words of the statute, and the absence of the "particularity requirement" related to the case was supported by legislative history.<sup>151</sup> Moreover, Judge Weeks concluded that if the court were "to hold that the RJA incorporates the same intent and case-specific requirements found in *Batson* and *McCleskey*, the RJA would have no independent meaning or effect," which would be contrary to legislative intent.<sup>152</sup>

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<sup>146</sup> See generally *supra* Parts III & IV.

<sup>147</sup> The state quickly announced that it would appeal the ruling. See Campbell Robertson, *Bias Law Used to Move Man off Death Row*, N.Y. TIMES, April 20, 2012, available at <http://www.nytimes.com/2012/04/21/us/north-carolina-law-used-to-set-aside-a-death-sentence.html?pagewanted=all>.

<sup>148</sup> Order Granting Motion for Appropriate Relief at 2, *State v. Robinson*, 91 CRS 23143 (N.C. Super. Ct. Apr. 20, 2012) (quoting *McCleskey v. Kemp*, 481 U.S. 279, 319 (1987)).

<sup>149</sup> *Id.* at 3. See also *id.* at 160 (Conclusions of Law para. 2). The issue in terms of "significant impact" was whether race "had or likely had an influence or effect on decisions to exercise peremptory strikes." *Id.* at 31.

<sup>150</sup> *Id.* at 34–35.

<sup>151</sup> See *id.*

<sup>152</sup> *Id.* at 36. Judge Weeks employed standard statutory construction principles that the legislature is not assumed to have passed legislation that only recapitulated existing law or constitutional doctrine and is aware of prior case law and precedents when crafting related legislation. See *id.* at 30. I contend the case for reading meaning into the legislation is particularly strong in this

Likewise, Judge Weeks ruled that the defendant was not required to show prejudice in his case or an impact on the final composition of the jury. The clearest basis for both these rulings is found in the words of the statute. It states that “[i]f the court finds that race was a significant factor in decisions to seek or impose the sentence of death . . . the judgment shall be vacated,”<sup>153</sup> which grants relief without any requirement of prejudice.<sup>154</sup> Similarly, the RJA focuses on whether “[r]ace was a significant factor in decisions to exercise peremptory challenges during jury selection,”<sup>155</sup> which concerns the basis of the decision to exercise the challenges, not the resulting jury.<sup>156</sup>

## 2. Methods of Statistical Proof

Judge Weeks concluded that in enacting legislation that imposed no requirement of intentional discrimination, the legislature “adopted a well-established model of proof used in civil rights litigation.”<sup>157</sup> Indeed, as I developed in earlier sections, the legislation supports multiple methods of proof recognized in civil rights litigation.<sup>158</sup>

The court began by concluding that the RJA embraced the disparate impact model of proof and noted that this method of proof is often recognized as necessary to redress discrimination resulting from unconscious prejudices. Judge Weeks found such a rationale to be particularly appropriate for peremptory strikes, which have frequently been recognized to result from unconscious, in addition to deliberate, discrimination.<sup>159</sup>

His opinion then recognizes that although proof of intentional discrimination is not required, standards of proof used in civil rights legislation based on intentional discrimination could provide alternative avenues to establish a violation of the RJA. The “significant factor” terminology of the RJA and the “motivating factor” concept in mixed motive disparate treatment cases are, as the court

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instance since both supporters and opponents recognized this was significant reform legislation. *See* Kotch & Mosteller, *supra* note 9, at 2034, 2111–28 (describing political debate and specific contentions of two sides demonstrating the significance of the impact of the legislation as understood by those involved).

<sup>153</sup> Robinson Order, *supra* note 15, at 39 (quoting N.C. GEN. STAT. § 15A–2012(a)(3) (repealed 2012)). *See also id.* at 161 (Conclusions of Law para. 7).

<sup>154</sup> The court also reasoned that imposing no requirement of prejudice is consistent with the rule governing constitutional challenges to discrimination in jury pool cases. *See* Robinson Order, *supra* note 15, at 39–40.

<sup>155</sup> *Id.* at 40 (quoting N.C. GEN. STAT. § 15A–2011(b)(3) (amended 2012)).

<sup>156</sup> *Id.* at 160–61 (Conclusions of Law para. 4).

<sup>157</sup> *Id.* at 37.

<sup>158</sup> *See generally supra* Part IV(B).

<sup>159</sup> Robinson Order, *supra* note 15, at 36–37.

observed, quite similar.<sup>160</sup> Finally, the court endorsed “pattern or practice” analysis, which uses an organization’s standard operating procedure to establish a *prima facie* case, using statistical evidence as circumstantial evidence of intent.<sup>161</sup> This method of proof echoes the RJA’s provision allowing proof through patterns within prosecutorial units and the state.<sup>162</sup>

### 3. Burden of Proof and Burden Shifting

The court noted that the RJA imposes on the defendant the burden to prove by a preponderance of the evidence that “race was a significant factor in [decisions to exercise peremptory challenges during jury selection] in the county, the prosecutorial district, the judicial division, or the State at the time the sentence was sought or imposed.”<sup>163</sup> The statute then allows the state to offer rebuttal evidence.

Judge Weeks ruled the statutory scheme allows the defendant to establish a *prima facie* case through statistical proof of unadjusted data that demonstrates significant racial disparities in the prosecutor’s peremptory strikes. The state then has the opportunity, indeed the burden actually, to dispel the inference of discrimination. Finally, the ultimate burden of persuasion remains with the defendant, and in determining whether that burden has been met, the court would consider all the evidence introduced.<sup>164</sup>

Each of these observations appears sound and, in the court’s step-by-step analysis, indeed largely uncontroversial. Judge Weeks breaks no substantive or theoretical new ground regarding the burden of proof, ruling that the statute does not shift the ultimate burden of proof, which he concludes remains with the defendant. As I argued earlier,<sup>165</sup> the effective change of burden in the statute rests not in any technical or unusual shifting of the burden of persuasion. Instead, the important changes are twofold: first, the definition of the ultimate issue to be proved to entitle the defendant to relief is simply that race was a significant factor in peremptory challenge decisions in relevant prosecutorial districts;<sup>166</sup> and second, it authorizes the use of statistical evidence to prove this issue. These two changes mean that at the end of the evidence, if the state has not effectively rebutted the statistical showing, the defendant prevails without any formal shift in the burden of persuasion.

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<sup>160</sup> See *id.* at 42. See text accompanying *supra* note 84 (discussing the similarity of the RJA terminology to the mixed motive statute and case law).

<sup>161</sup> Robinson Order, *supra* note 15, at 42.

<sup>162</sup> See *id.* at 43.

<sup>163</sup> *Id.* at 33 (quoting N.C. GEN. STAT. § 15A-2011(c) (amended 2012)).

<sup>164</sup> See *id.* at 33–34.

<sup>165</sup> See text accompanying *supra* notes 69 & 74.

<sup>166</sup> See N.C. GEN. STAT. § 15A-2012(a)(3) (repealed 2012).

### B. Analysis of the Facts

The majority of the lengthy opinion involves a meticulous recitation and analysis of the evidence, which included not only the statistical study described generally in Part V, but also testimony and documentary evidence. This included testimony from Robinson's expert witnesses regarding that study and its interpretation,<sup>167</sup> the history and practices of exclusion of African-Americans from juries in the state and the region,<sup>168</sup> and the impact of subconscious discrimination.<sup>169</sup> The state's rebuttal evidence included also expert testimony critiquing the defendant's study<sup>170</sup> and describing African-American attitudes related to the criminal justice system and capital punishment,<sup>171</sup> and testimony from a former prosecutor who tried the Robinson case.<sup>172</sup>

With regard to the defendant's statistical study, the court found that the study was sound in its methodology and execution, that the researchers were competent and qualified, and that the two experts who testified were unbiased and credible.<sup>173</sup> The court went through a sequential process of examining the evidence. It began with unadjusted statistical analysis of peremptory challenges to African American venire members, then layered in adjustments made in analyzing the data by the defendant's experts, and added to that the state's critique of that study along with its own proof and additional arguments. Finally the court considered non-statistical evidence.

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<sup>167</sup> This testimony was given by Associate Professor Barbara O'Brien of Michigan State Law School who holds a J.D. degree from the University of Colorado School of Law and a Ph.D. in social psychology from the University of Michigan. See Robinson Order, *supra* note 15, at 6. Along with Professor Catherine Grosso, she conducted a statewide jury selection study. See *id.* at 44. George Woodworth, professor emeritus of statistics and public health from the University of Iowa, who hold a Ph.D. in mathematical statistics from the University of Minnesota also provided expert testimony regarding the validity of the study and concepts relevant to a statistical analysis of peremptory strikes. One key element of his testimony concerned statistical methods that permit researchers to use data collected over a large time span to target the effects of variables at a particular time by a "time smoothing analysis." See *id.* at 6-7, 61-62.

<sup>168</sup> Professor Bryan Stevenson of New York University School of Law and director of the Equal Justice Initiative in Montgomery, Alabama provided this testimony. See *id.* at 8.

<sup>169</sup> Associate Professor of Psychology Samuel R. Sommers of Tufts University, North Carolina District Court Judge Louis A. Trosch, Jr. See *id.* at 7-9, and Professor Stevenson gave this testimony.

<sup>170</sup> Retired professor Joseph Katz, who has a Ph.D. in quantitative methods from Louisiana State University and taught previously at Georgia State University College of Business was this expert. Katz assisted the state in the *McCleskey* case. See *id.* at 10-11.

<sup>171</sup> Assistant Professor of Political Science at Methodist University in Fayetteville, N.C. provided this testimony. See *id.* at 11. He holds a Ph.D. in political science from the University of Massachusetts at Amherst.

<sup>172</sup> John W. Dickson is the former prosecutor. He currently serves as North Carolina District Court Judge in Cumberland County. See *id.* at 9.

<sup>173</sup> See *id.* at 96-97.

With regard to the unadjusted statistical analysis of racial disparities in peremptory strikes, the court first examined state-level results and moved progressively to smaller prosecutorial units, all the way to Robinson's capital trial. The results at each level were statistically significant disparities, beginning with the state-wide data for various time periods and moving down to the judicial district and county, where Robinson's case was tried, to the cases handled by the prosecutors in his case, and to the peremptory strikes at his capital trial.<sup>174</sup> The court summarized these results as "consistently significant to a very high level of reliability and that there is a very small and insignificant chance that the differences observed in the unadjusted data are due to random variation in the data or chance."<sup>175</sup> Based on these results, the court first found race "was a materially, practically, and statistically significant factor in decisions to exercise peremptory challenges," *inter alia*, at the time of Robinson's trial in the state and the judicial division and county where Robinson's trial was conducted and in Robinson's trial.<sup>176</sup> Indeed, Judge Weeks found the unadjusted data sufficiently strong to permit an inference of intentional discrimination at these various levels.<sup>177</sup>

Next the court examined adjustments made by Robinson's experts in their study by controlling for a number of non-racial factors that may correlate with race but are themselves race-neutral.<sup>178</sup> Different sets of factors were controlled for at the state level, in the county, and for the cases tried by Robinson's prosecutors.<sup>179</sup> After these controls, the magnitude of the effects of race on predicting prosecutorial strikes remained robust.<sup>180</sup> The court concluded based on this further analysis that race "was a materially, practically and statistically significant factor in decisions to exercise peremptory challenges" by prosecutors in the state, the county and in the cases prosecuted by the prosecutors who handled Robinson's case, and that prosecutors have intentionally discriminated in those same areas and cases.<sup>181</sup>

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<sup>174</sup> See *id.* at 56–69.

<sup>175</sup> See *id.* at 69. The court recounted testimony regarding the practical and material significance of the data results. See *id.*

<sup>176</sup> See *id.* at 70. As required by the statute, see, e.g., N.C. GEN. STAT. § 15A-2011(b) (amended 2012), the court focused its findings at the time of Robinson's trial. In making this finding, the court relied on testimony by Professor Woodworth both for state-wide and Cumberland County data using a "time smoothing analysis" to utilize results in other cases and develop a confidence interval regarding the time of Robinson's trial. See Robinson Order, *supra* note 15, at 61, 67.

<sup>177</sup> See Robinson Order, *supra* note 15, at 70–71. This second part of the study was based on a random sample of the venire members in the study's first part, amounting to approximately 25% of that group. In the second part of the study, additional descriptive information was included that might bear on a prosecutor's decision to strike. See *id.* at 50–51.

<sup>178</sup> See *id.* at 71–87.

<sup>179</sup> See *id.* at 71–84. The factors controlled for differed for Cumberland County, see *id.* at 80; see also *id.* at 83 (and for the cases handled by Robinson's prosecutors).

<sup>180</sup> See *id.* at 86.

<sup>181</sup> See *id.* at 87–88.

The court then considered the state's critique of the defendant's statistical evidence and its own statistical evidence. The state's principal objection was a contention that variables not captured in the written record, such as "negative demeanor," were not included in the adjusted analysis, undercutting its validity. The court found no credible evidence to support the state's contention. First, the defendant's expert testified that there is no evidence that such "negative demeanor" correlates with race, and second, when the prosecutors were asked by the state as part of its rebuttal effort to explain strike decisions, both in the county where the *Robinson* case occurred and state-wide, the vast majority of the reasons proffered were in fact captured in the record.<sup>182</sup> The state suggested several corrections to the data, some of which Robinson's expert accepted as valid and others it rejected but still incorporated into the analysis by a "shadow coding," which performed a re-analysis that assumed the accuracy of the specific adjustment. After those operations were completed, the significance of race in peremptory challenges remained highly significant.<sup>183</sup> Considering all these objections, the court found in the words of the statute that "race was a significant factor in decisions to exercise peremptory challenges by prosecutors" and reaffirmed its finding regarding intentional discrimination.<sup>184</sup>

The court considered two final objections by the state to the statistical evidence. Its expert contended the analysis should focus on the racial composition of seated jurors as opposed to those who were removed by peremptory strikes. The court ruled that this evidence did not alter its conclusions for three reasons. First, the statute is concerned with race as a significant factor in decision to exercise peremptory strikes, and it does not require an effect on the final composition of the jury.<sup>185</sup> Second, the court found that defense attorneys had also used race as a factor in the exercise of peremptory challenges but concluded that conduct constituted an additional violation of the statute rather than a cure for racial influence prosecutorial strikes.<sup>186</sup> Third, the state did not present evidence disputing Robinson's contention and the court's finding that the final composition of Robinson's jury was affected by disparate strikes by the state.<sup>187</sup> Finally, the court addressed the multiple regression model that the state's expert constructed to determine if he could find some combination of factors that rendered the race variable statistically insignificant. The court found the methodology either invalid or of minimal value in evaluating the defendant's statistical evidence and

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<sup>182</sup> See *id.* at 88–89.

<sup>183</sup> See *id.* at 91–95.

<sup>184</sup> See *id.* at 95. The court noted in a series of detailed findings the high quality of the defendant's statistical study and that the results met traditional standards of statistical significance generally and in the area of employment law related to disparate impact. See *id.* at 96–102.

<sup>185</sup> See *id.* at 102–03. See N.C. GEN. STAT. § 15A–2011(b)(3) (repealed 2012) and text accompanying *supra* note 155.

<sup>186</sup> See Robinson Order, *supra* note 15, at 103.

<sup>187</sup> See *id.* at 104.

concluded that the model did not rebut the defendant's statistical evidence.<sup>188</sup> Considering all the statistical evidence offered by both sides, the court once again found that race was a significant factor in decisions to exercise peremptory challenges by prosecutors in the state, the judicial district, and county where Robinson was tried, and in the cases handled by those who prosecuted Robinson and the court concluded that prosecutors intentionally discriminated in those same areas and cases.<sup>189</sup>

The court then added other proof, including testimony from three experts called by Robinson, who testified regarding history and practices with respect to excluding African-American from juries and the operation of unconscious bias in decision-making and jury selection.<sup>190</sup> The impact of unconscious discrimination is one of several points where the state's rebuttal witnesses provided evidence that ultimately supported Robinson's position. The former prosecutor who helped try Robinson's case testified that everyone discriminates and such discrimination is sometimes unconscious and sometimes purposeful. He acknowledged that despite his efforts, he may have engaged in unconscious discrimination in jury selection.<sup>191</sup>

Another aspect of the state's evidence that was unhelpful to its position was the explanation by a state expert, a professor of political scientist at a local university, who testified that as a group, African Americans are more concerned about fairness and inequality in the criminal justice system and are less likely than whites to favor the death penalty.<sup>192</sup> The state argued that this expert's testimony was admissible to show that the higher strike rate for African Americans was due to their death penalty views, not to race.<sup>193</sup> The court found the evidence largely unhelpful to the case, because such group attitude evidence would be, as the expert admitted, an inappropriate basis for peremptory strike decisions against individual African-American jurors,<sup>194</sup> and its use by the state provided some evidence that prosecutors base strike decisions based on beliefs of African Americans as a group.<sup>195</sup>

A third rebuttal effort by the state fared little better. The state attempted to provide race neutral explanations for various strikes against African-American venire members. The court carefully documented a set of reasons why many of these explanations were biased or unscientifically secured, were pretextual,

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<sup>188</sup> See *id.* at 104–07.

<sup>189</sup> See *id.* at 108.

<sup>190</sup> See *id.* at 109–19. See *supra* notes 168 & 169 (providing identifying information regarding these experts).

<sup>191</sup> See Robinson Order, *supra* note 15, at 118.

<sup>192</sup> See *id.* at 129.

<sup>193</sup> See *id.*

<sup>194</sup> See *id.* at 130.

<sup>195</sup> See *id.* at 132.

generally lacked probative value, and, on the whole, did not rebut the statistical and non-statistical evidence introduced by the defendant.<sup>196</sup>

In completing the evidentiary picture from non-statistical sources, the court described a number of instances in death penalty cases where race affected the exercise of peremptory challenges. The court found these to constitute some evidence that race played a role in the exercise of peremptory challenges and some evidence of intentional discrimination.<sup>197</sup> It noted briefly that several of the defendant's experts had testified about the availability of training programs regarding the nature of contemporary, often unconscious, racial bias and how to minimize its operation. The court observed that no training programs were provided for local prosecutors to avoid discrimination in jury selection and instead that the only training provided to prosecutors concerned how to avoid a finding of a *Batson* violation.<sup>198</sup> The court concluded with the overall observation that the non-statistical evidence converged with, and was supportive of, the results of the statistical study.<sup>199</sup>

### C. Major Operative Conclusions

On the basis of the totality of the statistical and other evidence, the court concluded that race was a significant factor in decisions to exercise peremptory challenges during jury selection at the time of Robinson's trial.<sup>200</sup> It also concluded that race was a significant factor in prosecutorial decisions to exercise peremptory challenges during jury selection at the time of Robinson's trial in the state, the judicial division and the county where he was tried.<sup>201</sup> Although not required in his judgment under the RJA, Judge Weeks ruled alternatively that race was a significant factor in prosecutorial decisions to exercise peremptory challenges in Robinson's capital trial.<sup>202</sup>

Although concluding that such a finding was not required under the RJA, the court ruled additionally and alternatively that under the totality of the evidence, prosecutors had intentionally used race of the venire members as a significant factor in decisions to exercise peremptory challenges in the state, the judicial

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<sup>196</sup> See *id.* at 119–28.

<sup>197</sup> See *id.* at 132–55. These included instances where African Americans were struck because of membership in organizations or associations that are historically or predominantly African American; where African Americans were struck after being asked explicitly race-based questions; where African Americans were subjected to different questioning; where African Americans were struck for patently irrational reasons; where African Americans were struck for pretextual reasons based on demeanor; and where African Americans were treated differently.

<sup>198</sup> It cited an example of explanations that carefully followed the model explanation provide in the training materials to provide race-neutral reasons for peremptory strikes. See *id.* at 155–57.

<sup>199</sup> See *id.* at 158–60.

<sup>200</sup> See *id.* at 164 (Conclusions of Law para. 19).

<sup>201</sup> See *id.* (Conclusions of Law para. 20–22).

<sup>202</sup> See *id.* (Conclusions of Law para. 23).



division and county where his trial was conducted and in his trial.<sup>203</sup> Similarly, the court ruled alternatively that, under the totality of the evidence, due in part to the prosecutors' disproportionate strikes of qualified African-American venire members, African Americans were significantly underrepresented on Robinson's jury.<sup>204</sup> Finally, it concluded that Robinson had proven that race was a significant factor in decisions to exercise peremptory challenges applying either a disparate impact analysis or a disparate treatment analysis.<sup>205</sup>

The findings of fact and conclusions of law are wide, deep, and thorough. Judge Weeks was clearly convinced that race had played an improper role in peremptory strikes and that the law and the facts demanded that the defendant prevail and be granted relief under the statute. He began the opinion with this summary of the evidence and its implications:

Robinson introduced a wealth of evidence showing the persistent, pervasive, and distorting role of race in jury selection throughout North Carolina. The evidence, largely un rebutted by the State, requires relief in this case and should serve as a clear signal of the need for reform in capital jury selection proceedings in the future.<sup>206</sup>

Indeed, the statistical and other evidence recounted and analyzed in the *Robinson* opinion provides strong support for the court's conclusions.<sup>207</sup>

## VII. CONCLUSION

The RJA manifests a clear intent to overcome the restrictions imposed by *McCleskey* on the use of statistical evidence and to use such evidence to eliminate the impact of race where it is a "significant factor in decisions to seek or impose the death penalty" in pertinent prosecutorial units where a death sentence was imposed. Most innovatively, it gives force to the long-established prohibition articulated in *Strauder*, *Swain*, and *Batson* that jurors may not be excluded by racially discriminatory peremptory challenges, stating that the statute's commands are violated if it is shown that "[r]ace was a significant factor in decisions to

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<sup>203</sup> See *id.* at 164–65 (Conclusions of Law para. 24).

<sup>204</sup> See *id.* at 165 (Conclusions of Law para. 25).

<sup>205</sup> See *id.* (Conclusions of Law para. 26).

<sup>206</sup> *Id.* at 3.

<sup>207</sup> Many of the strengths of the evidence for Robinson will apply to other RJA cases challenge peremptory strikes, but elements may vary between cases. For instance, in Robinson's case, racially disparate peremptory strikes occurred at every level of prosecutorial unit relevant under statute and involved general a substantial number of cases, and racially disparate strikes were used in his own capital case. Moreover, the state's rebuttal was found by the court to be ineffective and in some instances affirmatively damaging to the state's position. See text accompanying *supra* notes 191–196.

exercise peremptory challenges during jury selection.”<sup>208</sup> By cumulating peremptory strike patterns and potential neutral justifications across cases, the RJA, and in concrete terms defendant’s statistical analysis in *Robinson*, provided the court an opportunity to apply a careful analysis to the determination of whether racial discrimination in jury selection occurred. The examination of a practice that *Batson* acknowledged “undermines public confidence in the fairness of our system of justice”<sup>209</sup> deserves the careful review that the RJA affords but has been generally missing under the limited procedures available through *Batson* itself.

To enforce the commands of the RJA, an extensive study was conducted to gather data and to analyze the impact of race on the cases of all those on North Carolina’s death row.<sup>210</sup> The study shows significant racial disparities after a broad range of legitimate potential explanations have been considered for peremptory strikes exercised by the prosecution.<sup>211</sup> The court’s decision in *Robinson* found the study valid and its results powerful evidence that race played a role prohibited by the RJA in the exercise of peremptory challenges in that case.<sup>212</sup>

I conclude that the original RJA statute, using accepted doctrines on the use of statistical evidence and burden shifting in civil rights cases, provided the courts with the tools needed to employ statistical evidence fully to determine whether the race played a significant role in decisions to seek or impose the death penalty. This article focused on the innovative and important function of that statute in curing the weaknesses of current constitutional caselaw regarding discrimination in peremptory strikes.

The RJA promised to fulfill for death penalty cases the universally accepted precept that those who sit on our juries cannot be determined on the basis of race. The North Carolina courts began the task of giving a precise interpretation of the law and evaluating the statistical study and other relevant evidence. The *Robinson* decision was an impressive first step in that process. However, a legislature unfriendly to the RJA made major changes in the law shortly after that decision although it maintained the innovative focus on the improper use of race in peremptory strikes.

As the impact of the 2012 changes are resolved in future litigation, the original RJA remains a model for consideration by other states interested eradicating the improper use of race in peremptory challenges and remedying the failures of *McCleskey* and *Batson*. Unfortunately, North Carolina may now be a less fruitful testing ground for the operation of these innovative provisions. However, the promise the RJA demonstrated in the *Robinson* opinion remains, for the RJA was not abandoned because the statistical evidence was found flawed or proved unmanageable, nor was the pernicious effect of race found absent. Indeed,

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<sup>208</sup> Robinson Order, *supra* note 15, at 3.

<sup>209</sup> *Batson v. Kentucky*, 476 U.S. 79, 87 (1976).

<sup>210</sup> See generally O’BRIEN & GROSSO, *supra* note 121.

<sup>211</sup> See *supra* Part V(B).

<sup>212</sup> See generally Robinson Order, *supra* note 15.

the trial court's judgment in *Robinson* revealed a deeply troubling pattern of improper use of race in peremptory strikes that it concluded clearly warranted remedy.

Time and future litigation will resolve the legacy of the RJA. It started as an effort to cure the impact of *McCleskey* and eliminate the weakness of *Batson*. Hopefully, the tragic lost opportunities of *McCleskey* will not be repeated.

